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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 487

CANADA MALTING COMPANY, LTD., PETITIONER,

vs.

PATERSON STEAMSHIPS, LTD.

No. 488

BRITISH EMPIRE GRAIN COMPANY, LTD., PETITIONER,

vs.

PATERSON STEAMSHIPS, LTD.

No. 489

HENRY K. STARNES, DOING BUSINESS AS H. K. STARNES & COMPANY, PETITIONER,

vs.

PATERSON STEAMSHIPS, LTD.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 27, 1931

CERTIORARI GRANTED NOVEMBER 30, 1931

(36,301, 36,302, 36,303)

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CANADA MALTING COMPANY, LIMITED, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

HENRY K. STARNES, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

STATEMENT UNDER RULE IV, SECTION 1, SUBDIVISION 1 OF THE RULES IN ADMIRALTY OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The suit of Canada Malting Company, Limited, was commenced by the filing of libel on July 21, 1930, and the attachment under a writ of foreign attachment of the Steamer [fol. 2] "Lachinedoc", the property of the respondent which was released from the attachment through the filing of a stipulation in the sum of Forty Thousand Dollars ($40,000.00) by the respondent.

The suit of British Empire Grain Company, Limited, was commenced by the filing of libel on July 21, 1930, and the attachment under a writ of foreign attachment of the steamer "Lachinedoc" the property of the respondent which was released from the attachment through the filing of a stipulation in the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) by the respondent.

The suit of Henry K. Starnes was commenced by the filing of libel on July 22, 1930. Stipulation in the sum of Seven Thousand Five Hundred Dollars ($7,500.00) in lieu of attachment was filed by the respondent.

The names of the original parties are Canada Malting Company, Limited against Paterson Steamships, Limited; British Empire Grain Company, Limited, against Paterson Steamships, Limited; Henry K. Starnes, against Paterson Steamships, Limited. No change of parties has taken place.

In each of said suits a notice of appearance was filed on July 24, 1930, by the respondent-appellee.

In each of said suits on September 9, 1930, exceptions to the libels were filed by the respondent.

[fol. 3] In each of said suits on September 9, 1930, a suggestion was filed by the respondent that the District Court ought not to entertain or exercise further jurisdiction.

In each of said suits on September 9, 1930, a notice of motion was served and filed based upon affidavits and said exceptions and suggestion praying that the District Court exercise discretion and refuse to take and entertain further jurisdiction, dismiss the libel and vacate writ of foreign attachment, remit libellant to remedies in the Courts of the Dominion of Canada, direct that bond and stipulation for the release of the Steamer "Lachinedoc" be cancelled and discharged, and for such other and further relief as might be incidental or proper in the premises.

Said motions were heard by Honorable John R. Hazel on September 22, 1930. On October 6, 1930, opinion of Judge Hazel was filed granting respondent's motions.

Petition of the libellants for rehearing was filed October 30, 1930. On January 3, 1931, opinion of Judge Hazel on the petition for rehearing was filed amending his first opinion but adhering to decision granting respondent's motions.

Final decrees were entered January 21, 1931.

No question was referred to a commissioner or commissioners.

Notice of appeal was filed March 25, 1931, in each suit.

[fol. 4] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

LIBEL OF CANADA MALTING COMPANY, LIMITED

To the Honorable the District Judges of the United States for the Western District of New York.

The libel of Canada Malting Company, Limited, in a cause of collision and damage, civil and maritime, against

Paterson Steamships, Limited, respectfully shows and alleges as follows:

First. That libellant is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the Laws of the Dominion of Canada.

Second. That Paterson Steamships, Limited, is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the Laws of the Dominion of Canada, and is and at all times hereinafter mentioned was the owner and operator of the Steamer "Mantadoc."

Third. That heretofore and on or about the 9th day of July, 1930, the libellant shipped on board the steamer "Yorkton" at Port Arthur, Ontario, 67,346 bushels of Barley, in good order and condition to be transported in said steamer and delivered to the order of libellant at Montreal, Canada, and that libellant is and at all times herein mentioned was the sole owner of said Barley.

Fourth. That the said Steamer "Yorkton" sailed from Port Arthur on July 9, 1930 with said shipment of Barley [fol. 5] on board, and that while on said voyage and at about 11:22 P. M. when about 3 miles northwest of Whitefish Point on Lake Superior, in American waters, in a dense fog, said Steamer "Yorkton" was struck by the Steamer "Mantadoc" so that the Steamer "Yorkton" commenced to fill with water, and the water flooded her fires and she commenced to sink and after being taken in tow by the Steamer "Mantadoc" she did sink on the beach, a short distance below Whitefish Point on the American shore, and the said shipment of barley became a total loss.

Fifth. That at the time of said collision said Steamer "Yorkton" was running under reduced speed and those on board the Steamer "Yorkton" had made out the fog signals of a steamer that proved to be the "Mantadoc", that said signals bore on the starboard side of the Steamer "Yorkton" and that the Steamer "Yorkton" directed her course to port in order to keep out of the way of the steamer whose signals had been heard, but that suddenly the Steamer "Mantadoc" loomed up in the fog a short distance off, coming at a high and unlawful rate of speed, and although those on the Steamer "Yorkton" endeavored

to throw her stern away from the oncoming Steamer "Mantadoc", the Steamer "Mantadoc" nevertheless came on and with her stem crashed into the starboard side of the Steamer "Yorkton" a short distance forward of her stern, and opened up the side of the Steamer "Yorkton" so that she commenced to fill and sink.

[fol. 6] Sixth. And not being informed as to all that took place on board said steamers, and reserving the right to urge such other and further faults as may appear upon a full hearing of this cause, that respondent is at fault for said collision in that those in charge of the navigation of the Steamer "Mantadoc" were guilty of faults and negligence, in that they were careless and inattentive to their duties, in that no proper lookout was maintained, in that said steamer was navigated at too great a speed in a fog, in that she did not give proper heed to the signals of the Steamer "Yorkton", in that she did not stop and reverse her engines in time as should have been done, all in violation of the law and pilot rules.

Seventh. That said collision was not the result of any fault on the part of libellant; that by reason of the premises, libellant has sustained damage in the sum of Forty Thousand Dollars ($40,000.00).

Eighth. That respondent has goods and chattels within this district, to-wit: the Steamer "Lachinedoc".

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that citations in due form of [fol. 7] law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against Paterson Steamships Limited, and that it by its officers may be compelled to appear and answer upon oath all and singular the matters aforesaid, and if the said corporation cannot be found within this District, that an attachment issue against its goods and chattels, and that this Honorable Court will be pleased to decree the payment of the damages aforesaid, with the costs, and

libellant may have such other and further relief as to law and justice may appertain.

Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, N. Y., and Bigham, Englar, Jones & Houston, 64 Wall Street, New York, N. Y., Proctors for Libellant.

Duly sworn to by Laurence E. Coffey. Jurat omitted in printing.

[fol. 8] In United States District Court, Western District of New York

Canada Malting Company, Limited, Libelant,

vs.

Paterson Steamships, Limited, Respondent

Notice of Appearance

Sirs: Please take notice that Paterson Steamships Lim-
[fol. 9] ited, the Respondent above named, appears in this action and that we are retained as its proctors.

Dated Buffalo, New York, July 22nd, 1930.

Yours, etc., Stanley & Gidley, Proctors for Respondent. Office and Post-office address: 1042 Marine Trust Building, Buffalo, N. Y.

To Brown, Ely & Richards and Bigham, Englar, Jones & Houston, Proctors for Libellant.

United States District Court, Western District of New York

In Admiralty

Canada Malting Company, Ltd., Libelant,

against

Paterson Steamships Limited, Respondent

Notice of Motion to Dismiss, etc.

Sirs: Please take notice that upon the annexed affidavit [fol. 10] of Ermin Burton Sutherland, sworn to the 6th day of September, 1930, and the annexed affidavit of Wil-

liam W. Hall, sworn to the 4th day of September, 1930, and the annexed affidavit of Rufus Clement Holden, Jr., sworn to the 4th day of September, 1930, and the annexed affidavit of George D. MacDonald, sworn to the 8th day of September, 1930, and the annexed affidavit of Ellis H. Gidley, sworn to the 8th day of September, 1930, and upon the libel heretofore filed herein and the writ of foreign attachment heretofore issued out of this Court, and the return of the Marshal thereto, and upon respondent's exceptions to said libel, and upon the suggestion of Paterson Steamships Limited filed herewith, a motion will be made by the undersigned at a stated session of this Court appointed to be held for the disposition of maritime causes in the United States District Court Room in the Federal Building in the City of Buffalo, New York, on the 15th day of September, 1930, (said day being the return day of process issued under the libel filed in the above entitled action) at ten o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard, for an order and decree of this Honorable Court granting and decreeing to Paterson Steamships Limited, respondent in the above entitled action, the following relief:

1. That the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action.

[fol. 11] 2. That the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Steamer Lachinedoc, the property of Paterson Steamships Limited, on or about the 21st day of July, 1930.

3. That the Court remit libelant to its remedies in the Courts of the Dominion of Canada.

4. That the Court direct that the bond and stipulation heretofore given and filed herein by Paterson Steamships Limited with American Surety Company of New York, as surety, for the release of the Steamer Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant, be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation.

5. That the Court grant a decree to Paterson Steamships Limited for such other and further relief herein as may be incidental thereto or proper in the premises.

Yours, etc., Stanley & Gidley, Proctors for Respondent, Paterson Steamships, Limited.

To May C. Sickmon, Clerk of the Court; Brown, Ely & Richards, and Bigham, Englar, Jones & Houston, Proctors for Libellant.

[fol. 12] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

SUGGESTION

To the Honorable the Judges of the United States District Court for the Western District of New York:

Paterson Steamships Limited, a corporation of the Dominion of Canada, named as respondent herein, respectfully suggests to this Honorable Court that this Honorable Court ought not entertain or exercise further jurisdiction over the above entitled action, for the reason that it appears upon the face of the libel herein and from the moving papers attached hereto, that the matters and things complained of by libelant, which is a citizen and subject of the Dominion of Canada, against respondent, which is also a citizen and subject of the Dominion of Canada, arose out of a collision between a vessel of Canadian registry, with another vessel of Canadian registry, while carrying cargo [fol. 13] owned by a Canadian citizen and being transported from one Canadian port to another Canadian port, all of which matters and things are properly the subjects of hearing and determination by the Courts of the Dominion of Canada, in accordance with the statutes and rules of

law of the Dominion of Canada in such case made and provided.

Wherefore Paterson Steamships Limited prays that this Honorable Court will refuse to entertain or exercise further jurisdiction herein; that the libel herein be dismissed and that the writ of foreign attachment heretofore served herein be vacated, and the bond heretofore given herein be cancelled of record; and that libelant be remitted to the Courts of the Dominion of Canada for the exercise of the remedies there afforded it.

Paterson Steamships Limited, by E. B. Sutherland.

Duly sworn to by E. B. Sutherland. Jurat omitted in printing.

[fol. 14] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

EXCEPTIONS TO LIBEL

To the Honorable the Judges of the United States District Court for the Western District of New York:

The exceptions of Paterson Steamships Limited, respondent in the above entitled action to the libel of Canada [fol. 15] Malting Company, Ltd., alleges:

I. That upon the facts alleged in the libel herein this Honorable Court ought not to entertain or exercise further jurisdiction over the pending action.

II. That the matters and things set forth in the libel herein constitute a matter of liability or of obligation admeasured and determinable according to the laws and statutes of the Dominion of Canada and cognizable by the Courts of the Dominion of Canada.

III. That upon the matters and things set forth in the libel herein, libelant ought to be remitted to the Courts of the Dominion of Canada.

Dated Buffalo, New York, September 2nd, 1930.
Stanley & Gidley, Proctors for Respondent, Paterson Steamships Limited.

[fol. 16] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

AFFIDAVIT OF ERMIN BURTON SUTHERLAND

DOMINION OF CANADA,
Province of Ontario, ss:

Ermin Burton Sutherland, being duly sworn, deposes and says that he is a resident of Fort William, Ontario, and is Secretary of Paterson Steamships Limited, respondent in the above entitled action.

That Paterson Steamships Limited is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, having its principal office at Fort William, Ontario. That Paterson Steamships Limited is engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters, and that said Paterson Steamships Limited is the owner and operator of some thirty lake and Welland Canal [fol. 17] freight carrying vessels; that among the vessels owned and operated by Paterson Steamships Limited is the Steamer Mantadoc, a vessel of the Dominion of Canada, registered at the Port of Fort William, and bearing Canadian registry No. 116580.

That it is alleged in the libel herein that libelant is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada.

That it is alleged in the libel herein that libellant was the owner of a portion of the cargo of grain laden and being transported on board the Steamer Yorkton on a voyage from Port Arthur to Montreal on or about the 9th day of July, 1930; that it is also alleged in said libel that the Steamer Yorkton and the Steamer Mantadoc were in collision on Lake Superior off Whitefish Point on the evening of the 9th day of July, 1930, and that as a result of said collision the Steamer Yorkton was later beached in a sinking condition, resulting in an alleged total loss of libelant's portion of her cargo, for which loss recovery is sought in this action for the sum of $40,000.00.

That the Steamer Yorkton is also a Canadian freight carrying vessel, being registered at the Port of Toronto Ontario, and bearing Canadian Registry No. 132060. That the Steamer Yorkton was at the time of said collision and [fol. 18] is owned and operated by the Mathews Steamship Company, Limited, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, or the laws of the Province of Ontario, and having its principal office in the City of Toronto, Ontario, and engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters.

That it is alleged in the libel herein that that portion of the cargo owned by libelant, which was being carried and transported upon the Steamer Yorkton at the time of said collision was shipped on board said vessel at Port Arthur, Ontario, on or about the 9th day of July, 1930, for carriage and transportation to and delivery at Montreal, Quebec. That at the time of the shipment and loading of libelant's said grain on board the Steamer Yorkton a bill of lading was issued therefor on behalf of said vessel at Fort William, Ontario, which said bill of lading acknowledged the shipment of said grain on board said Steamer Yorkton for carriage and transportation to and delivery at Montreal; that the contract for the carriage of said cargo was and is subject to, and governed by the laws of the Dominion of Canada, where the said contract was made and where it was to be performed.

That the licensed officers in charge of both the Steamers Mantadoc and Yorkton were citizens and residents of the [fol. 19] Dominion of Canada; that most, if not all, of the

members of the crews of both vessels were likewise citizens and residents of the Dominion of Canada.

That this action was begun by the filing of a libel in this Honorable Court, and by the issuance and service of a writ of foreign attachment upon the Steamer Lachinedoc at the Port of Buffalo on the 21st day of July, 1930; that the Steamer Lachinedoc is a vessel of Canadian registry, owned and operated by Paterson Steamships Limited; that the master of said vessel promptly reported the attachment of said vessel to Mr. George D. MacDonald, local vessel agent of Paterson Steamships Limited, at the Port of Buffalo; that the first notice of the attachment received by Paterson Steamships Limited at its office at Fort William, Ontario, was a telegram received from said MacDonald, dated July 22nd, 1930, advising that the Steamer Lachinedoc had been libeled in Buffalo on account of the Mantadoc case, and that he was arranging for bond so that the vessel be released. That as deponent was subsequently informed Mr. MacDonald retained Messrs. Stanley & Gidley, attorneys at Buffalo, to procure the release of said vessel Lachinedoc, and that on the morning of July 22nd, 1930, Messrs. Stanley & Gidley telegraphed Paterson Steamships Limited at Fort William, Ontario, advising that they had been instructed by Mr. MacDonald to release the Steamer Lachinedoc, and that it was necessary to file bonds totalling the [fol. 20] the sum or $60,000.00, and asking that the same be arranged for through the Winnipeg representative of the Canadian Surety Company. That during said morning said bonds were arranged for, and that later in the day the Steamer Lachinedoc was released and thereupon left the Port of Buffalo and proceeded upon her pending voyage.

That no instructions were given by Paterson Steamships Limited that a general appearance be entered herein in its behalf, and Paterson Steamships Limited in filing said bonds to procure release of the Steamer Lachinedoc did not intend thereby to waive any of its rights with respect to contesting the question of the exercise of jurisdiction by this Honorable Court over the questions of fault and damage arising out of said collision between the Steamer Yorkton and the Steamer Mantadoc; that if a general appearance was entered herein it was so entered without the knowledge or authority of said Paterson Steamships Limited: That following said collision an investigation as required

by law was duly held and conducted by the Wreck Commissioner of the Dominion of Canada, and that as a result thereof said Wreck Commissioner has determined and found the masters of both the Steamer Mantadoc and the Steamer Yorkton guilty of fault, resulting in said collision, and has suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

[fol. 21] That Paterson Steamships Limited have retained Messrs. Meredith, Holden, Heward & Holden, barristers and solicitors of Montreal, as its legal representatives, concerning the various questions arising out of said collision; that, as deponent is advised by Messrs. Meredith, Holden, Heward & Holden, and verily believes, if jurisdiction of the above entitled action be retained by this Court that under all the circumstances of this case this Honorable Court will be unable to do even-handed justice between the parties in accordance with the Canadian Law, to which all of the parties and vessels involved are subject.

That an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company, Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and will vacate the writ of foreign attachment and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish and will furnish a valid bond for a like amount in [fol. 22] any action in rem which the present libelant may institute in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the libelant may have.

That the Steamer Yorkton, though now raised, has not yet been repaired, and that in deponent's opinion in her present unrepaired condition said vessel is of little or no value as she now lies at Fort William, Ontario.

Wherefore, deponent prays that an order and decree of this Court be made refusing to take and entertain juris-

diction of the pending action, dismissing the libel and vacating the writ of foreign attachment heretofore served, cancelling the bond given for the release of the Steamer Lachinedoc, remitting the libelant to its remedies in the Courts of the Dominion of Canada, and for such other and further relief as may be just and proper in the premises.

E. B. Sutherland.

Subscribed and sworn to before me this 6th day of September, 1930. F. R. Morris, Notary Public. (Notarial Seal.)

[fol. 23] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

AFFIDAVIT OF WILLIAM WALTER HALL

DOMINION OF CANADA,
Province of Ontario, ss:

William Walter Hall being duly sworn deposes and says that he is a resident of Winnipeg, Manitoba, and is General Manager of Paterson Steamships Limited, respondent in the above entitled action.

The Paterson Steamships Limited is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, having its principal office at Fort William, Ontario. That Paterson Steamships Limited is engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters, and that said Paterson Steamships Limited is the owner and operator of some thirty lake and Welland Canal freight carrying vessels; that among the vessels owned and [fol. 24] operated by Paterson Steamships Limited is the Steamer Mantadoc, a vessel of the Dominion of Canada, registered at the Port of Fort William, and bearing Canadian Registry No. 116580.

That it is alleged in the libel herein that libelant is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada.

That it is alleged in the libel herein that libelant was the owner of a portion of the cargo of grain laden and being transported on board the Steamer Yorkton on a voyage from Port Arthur to Montreal on or about the 9th day of July, 1930; that it is also alleged in said libel that the Steamer Yorkton and the Steamer Mantadoc were in collision on Lake Superior off Whitefish Point on the evening of the 9th day of July, 1930, and that as a result of said collision the Steamer Yorkton was later beached in a sinking condition, resulting in an alleged total loss of libelant's portion of her cargo, for which loss recovery is sought in this action for the sum of $40,000.00.

That the Steamer Yorkton is also a Canadian freight carrying vessel, being registered at the Port of Toronto, Ontario, and bearing Canadian Registry No. 132060. That the Steamer Yorkton was at the time of said collision and is owned and operated by the Mathews Steamship Company, [fol. 25] Limited, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, or the laws of the Province of Ontario, and having its principal office in the City of Toronto, Ontario, and engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters.

That it is alleged in the libel herein that that portion of the cargo owned by libelant, which was being carried and transported upon the Steamer Yorkton at the time of said collision was shipped on board said vessel at Port Arthur, Ontario, on or about the 9th day of July, 1930, for carriage and transportation to and delivery at Montreal, Quebec. That at the time of the shipment and loading of libelant's said grain on board the Steamer Yorkton a bill of lading was issued therefor on behalf of said vessel at Fort William, Ontario, which said bill of lading acknowledged the shipment of said grain on board said Steamer Yorkton for carriage and transportation to and delivery at Montreal; that the contract for the carriage of said cargo was and is subject to and governed by the laws of the Dominion of Canada, where the said contract was made and where it was to be performed.

That the licensed officers in charge of both the Steamers

Mantadoc and Yorkton were citizens and residents of the Dominion of Canada; that most, if not all, of the members [fol. 26] of the crews of both vessels were likewise citizens and residents of the Dominion of Canada.

That this action was begun by the filing of a libel in this Honorable Court, and by the issuance and service of a writ of foreign attachment upon the Steamer Lachinedoc at the Port of Buffalo on the 21st day of July, 1930; that the Steamer Lachinedoc is a vessel of Canadian registry, owned and operated by Paterson Steamships Limited. That the first notice deponent had of the seizure of the Steamer Lachinedoc was a telephone conversation had with Mr. MacDonald, when deponent was in Toronto on the evening of July 21, 1930; that Mr. MacDonald then advised deponent that the Steamer Lachinedoc had been libeled at Buffalo on account of the Yorkton-Mantadoc collision, and deponent instructed Mr. MacDonald to have Messrs. Stanley & Gidley arrange for a bond so that the Steamer Lachinedoc might be released immediately. That as deponent was subsequently informed Mr. MacDonald retained Messrs. Stanley & Gidley, attorneys at Buffalo, to procure the release of said vessel Lachinedoc, and that on the morning of July 22nd, 1930 Messrs. Stanley & Gidley telegraphed Paterson Steamships Limited at Fort William, Ontario, advising that they had been instructed by Mr. MacDonald to release the Steamer Lachinedoc, and that it was necessary to file bonds totalling the sum of $60,000.00, and asking that the same be arranged for through the Winnipeg representative of [fol. 27] the Canadian Surety Company. That during said morning said bonds were arranged for, and that later in the day the Steamer Lachinedoc was released and thereupon left the Port of Buffalo and proceeded upon her pending voyage.

That no instructions were given by Paterson Steamships Limited that a general appearance be entered herein in its behalf, and Paterson Steamships Limited in filing said bonds to procure release of the Steamer Lachinedoc did not intend thereby to waive any of its rights with respect to contesting the questions of the exercise of jurisdiction by this Honorable Court over the questions of fault and damage arising out of said collision between the Steamer Yorkton and the Steamer Mantadoc; that if a general appearance was entered herein it was so entered without the knowledge

or authority of said Paterson Steamships Limited. That following said collision an investigation as required by law was duly held and conducted by the Wreck Commissioner of the Dominion of Canada, and that as a result thereof said Wreck Commissioner has determined and found the masters of both the Steamer Mantadoc and the Steamer Yorkton guilty of fault, resulting in said collision, and has suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

That Paterson Steamships Limited has retained Messrs. Meredith, Holden, Heward & Holden, barristers and solici-
[fol. 28] tors of Montreal, as its legal representatives, concerning the various questions arising out of said collision; that as deponent is advised by Messrs. Meredith, Holden, Heward & Holden, and verily believes, if jurisdiction of the above entitled action be retained by this Court that under all the circumstances of this case this Honorable Court will be unable to do even-handed justice between the parties in accordance with the Canadian Law, to which all of the parties and vessels involved are subject.

That an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company, Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and will vacate the writ of foreign attachment and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish and will furnish a valid bond for a like amount in any action in rem which the present libelant may institute
[fol. 29] in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the libelant may have.

Wherefore deponent prays that an order and decree of this Court be made refusing to take and entertain jurisdiction of the pending action, dismissing the libel and vacating the writ of foreign attachment heretofore served,

cancelling the bond given for the release of the Steamer Lachinedoc, remitting the libelant to its remedies in the Courts of the Dominion of Canada, and for such other and further relief as may be just and proper in the premises.

W. W. Hall.

Subscribed and sworn to before me this 4th day of September, 1930. Ivanhoe Bissonnette, Notary. (Notarial Seal.)

[fol. 30] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

AFFIDAVIT OF RUFUS CLEMENT HOLDEN, JR.

DOMINION OF CANADA,
Province of Quebec, ss:

Rufus Clement Holden, Jr., being duly sworn, deposes and says that he is a resident of the City of Montreal, Quebec, and that he is a member of the firm of Meredith, Holden, Heward & Holden, barristers and solicitors, engaged in the general practice of law in the City of Montreal, Quebec, with offices at 215 St. James Street, West.

That deponent's said firm has been retained by Paterson Steamships Limited as its local representatives for the handling and disposition of the various questions resulting from the collision between the Steamer Yorkton and the Steamer Mantadoc on Lake Superior on July 9th, 1930. [fol. 31] That deponent has had charge of the subject matter and of the various questions relating to said collision and is familiar therewith, and makes this affidavit accordingly.

That this action was brought in the United States District Court for the Western District of New York by the filing

of a libel by Canada Malting Company, Ltd., which is alleged to be a corporation of the Dominion of Canada; that it is alleged in the libel that libelant was the owner of a portion of the cargo of grain being carried on and transported by the Steamer Yorkton at the time of said collision. That it is alleged that said Steamer Yorkton was engaged in the transportation of said cargo of grain, was in collision with the Steamer Mantadoc upon the waters of Lake Superior off Whitefish Point on the evening of July 9, 1930, and that as a result thereof the Steamer Yorkton gradually sunk and was beached in a sinking condition resulting in the alleged total loss of libelant's portion of the cargo, for which recovery is sought in this action for the sum of $40,000.00.

That it is alleged therein that the Steamer Mantadoc, which is owned and operated by Paterson Steamships Limited, a corporation of the Dominion of Canada, was at fault for said collision and the resultant damage; that it is further alleged that the portion of said cargo of grain owned by libelant was laden on board the Steamer Yorkton at the Port of Port Arthur, Ontario, for carriage [fol. 32] and transportation to and delivery at the Port of Montreal, Quebec.

That as appears by the affidavit of Ermin Burton Sutherland, sworn to the — day of September, 1930, and the affidavit of William W. Hall, sworn to the 4th day of September, 1930, annexed hereto and made a part of these motion papers, the Steamer Yorktown is a vessel of Canadian registry, owned and operated by Mathews Steamship Company, Ltd., a Canadian corporation, and the Steamer Mantadoc is likewise a vessel of Canadian registry; that as also appears by said affidavits a bill of lading was issued for the carriage of said libelant's portion of said cargo of grain at Fort William, Ontario; that the contract for the carriage of said cargo was and is subject to, and governed by the laws of the Dominion of Canada, where the said contract was made and where it was to be performed.

That as also appears by said affidavits the licensed officers in charge of both Steamers Mantadoc and Yorkton were citizens and residents of the Dominion of Canada, and that most, if not all, of the members of the crews of both vessels

were likewise citizens and residents of the Dominion of Canada.

That as further appears by said affidavits following said collision an investigation as required by law was duly held by the Wreck Commissioner of the Dominion of Canada, and that as a result said Wreck Commissioner determined [fol. 33] and found the masters of both the Steamer Mantadoc and the Steamer Yorkton guilty of fault, resulting in the collision, and suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

That as deponent is advised by Messrs. Stanley & Gidley, local counsel for Paterson Steamships Limited at Buffalo, and verily believes this action was begun by the filing of a libel in personam on or about the 21st day of July, 1930, and the service of a writ of foreign attachment upon the Steamer Lachinedoc, a vessel of Canadian registry, owned by Paterson Steamships Limited, while said Steamer Lachinedoc was engaged in loading cargo at the Dakota Elevator in the Port of Buffalo.

That in an action of this nature pending in the Courts of the Dominion of Canada, the rule of law is that a cargo owner, in case of mutual fault on the part of both vessels, can only recover a moiety of his loss from the vessel colliding with the vessel upon which his cargo is being transported. That accordingly if this action was pending in the Courts of the Dominion of Canada and both ships were found in fault libelant would be able in no event to recover more than one-half of its damage as against the Steamer Mantadoc, and her owners, Paterson Steamships Limited. [fol. 34] That under Canadian Law the Steamer Yorkton and her owners could limit their liability only to an aggregate amount equivalent to $38.92, for each ton of the said Steamer Yorkton's registered tonnage with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage.

That an action by the owners of the said Steamship Mantadoc, Paterson Steamships Limited, against the owners of the said Steamer Yorkton, Mathews Steamship Company, Limited, for the damages occasioned by the collision in question has been instituted and is pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to

determine the question of liability as between the said ships and their owners.

R. Clement Holden, Jr.

Subscribed and sworn to before me at Montreal, Province of Quebec, Canada, this 4th day of September, 1930. Ivanhoe Bissonnette, Notary. (Notarial Seal.)

[fol. 35] In United States District Court, Western District of New York

In Admiralty

Canada Malting Company, Ltd., Libelant,

against

Paterson Steamships Limited, Respondent

Affidavit of George D. MacDonald

State of New York,
County of Erie, ss:

George D. MacDonald, being duly sworn, deposes and says that he is a resident of the City of Buffalo, New York; that he is engaged in the business of water transportation, and that he is local vessel agent for Paterson Steamships Limited at the Port of Buffalo, and was such on the 21st day of July, 1930.

That my duties as such vessel agent generally consist of seeing that vessels of that fleet coming into that Port receive proper dispatch in loading and unloading cargoes in the Port of Buffalo and also in transmitting orders from the owners to the masters of said ships.

[fol. 36] That on the 21st day of July, 1930, some time after four o'clock in the afternoon, I was advised that the Steamer Lachinedoc, then lying at the Dakota Elevator loading cargo had been attached by the United States Marshal for the Western District of New York under process issued out of this Honorable Court. I at once got in touch with Messrs. Stanley & Gidley, attorneys, with offices in the Marine Trust Building, Buffalo, and advised them of

such attachment, and informed them that it was desired to procure the release of said vessel from attachment at once, so that she would not be delayed in starting upon her then pending voyage. Mr. Otten of their office advised me that it was then too late in th day to procure any bond or to release the vessel, but that they would proceed promptly to obtain and file bond on the following morning. That in the evening I talked by telephone to Mr. William W. Hall, General Manager of Paterson Steamships Limited, who was then at Toronto, and advised him of the seizure of the Steamer Lachinedoc, and that I had taken the matter up with Messrs. Stanley & Gidley, with a view of procuring her release, and he instructed me to have Messrs. Stanley & Gidley obtain and file bond for the release of the Steamer Lachinedoc. Accordingly on the following morning I telegraphed Paterson Steamships Limited at Fort William, Ontario, that I had so advised Mr. Hall at Toronto, and that I was arranging bond so as to release the vessel promptly.

[fol. 37] The bond was obtained about two o'clock on the 22nd day of July, 1930, and the Steamer Lachinedoc was released, and thereupon left the port on the afternoon of that day.

I neither received nor gave any instructions other than as related above, and I had no authority as local vessel agent to do more than to facilitate the movement of the Steamer Lachinedoc when attached under the process of this Honorable Court.

George D. MacDonald.

Subscribed and sworn to before me this 8th day of September, 1930. Arthur E. Otten, Notary Public in and for Erie County, New York.

[fol. 38] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

AFFIDAVIT OF ELLIS H. GIDLEY

STATE OF NEW YORK,
County of Erie, ss:

Ellis H. Gidley being duly sworn, deposes and says that he is a resident of the City of Buffalo, New York, and is an attorney at law and a member of the firm of Stanley & Gidley, attorneys, with offices at 1042 Marine Trust Building, Buffalo, New York.

That on or about the 21st day of July, 1930, deponent's said firm was directed by Mr. George D. MacDonald to procure the release of the Steamer Lachinedoc from attachment at the Port of Buffalo upon a writ of foreign attachment issued in the above entitled action, and that deponent has had the subject matter in charge and is familiar therewith, and makes this affidavit accordingly.

[fol. 39] That following Mr. MacDonald's instructions deponent's said firm telegraphed Paterson Steamships Limited at Fort William, on the morning of July 22nd, 1930, that they had been so instructed, and that bonds were required in a total sum of $60,000.00, to release the Steamer Lachinedoc, and asked that said bonds be arranged through the Canadian Surety Company's representative at Winnipeg. That meanwhile deponent obtained copies of the libel from Messrs. Brown, Ely and Richards, proctors for libelant, and learned that two libels had been filed in this Court, one filed by Canada Malting Company, Ltd., seeking recovery of damage in the sum of $40,000.00, and one filed by British Empire Grain Company Limited, seeking recovery of damage in the sum of $20,000.00. That thereafter and about noon of said day deponent was informed by Messrs. Brown, Ely & Richards that they were filing a third libel for a similar cause of action in favor of Henry

K. Starnes, doing business as H. K. Starnes & Company, seeking recovery of the sum of $7,500.00, and that they were desirous of amending the libel filed by British Empire Grain Company so as to seek to recover only $12,500.00 therein.

That about the same time deponent was notified by the Buffalo Manager of the American Surety Company of New York that he had received authority to execute said bonds, and thereupon deponent drafted three separate bonds, one in favor of Canada Malting Company, Ltd., in the sum of [fol. 40] $40,000.00, one in favor of British Empire Grain Company Limited for the sum of $12,500.00, and one in favor of Henry K. Starnes, doing business as H. K. Starnes & Co., in the sum of $7,500.00, and procured the execution of the same, and after securing the approval of Messrs. Brown, Ely & Richards thereto filed the same in this Court together with a notice of appearance in each of said actions. Thereupon the Steamer Lachinedoc was released from attachment and immediately proceeded upon her then pending voyage.

That as appears from the libel herein, this action is brought by a corporation of the Dominion of Canada against a corporation of the Dominion of Canada. Recovery is sought herein for the alleged loss of a portion of cargo of grain being carried on the Steamer Yorkton as the result of the sinking of the Steamer Yorkton in the waters of Lake Superior on July 9th, 1930, following a collision between the Steamer Yorkton and the Steamer Mantadoc, owned by the respondent herein.

That the rule of law as applied in the Courts of Admiralty in the United States permits an owner of cargo laden upon one of two vessels involved in a collision to sue either one or both vessels, or the owners thereof, at his election; and, if such cargo owner did not contribute to the disaster, permits his recovery, in either event, of the full amount of his loss notwithstanding that the collision [fol. 41] be held to be due to mutual fault. That it results that if this Honorable Court retains jurisdiction of this action and applies the United States rule of damage that Paterson Steamships Limited, if fault be found, would be held liable herein for the full amount of cargo owner's damage, even though it be found that both the Steamer Mantadoc and the Steamer Yorkton were mutually at fault.

That if said Paterson Steamships Limited be condemned herein for the full amount of cargo owner's damage, Paterson Steamships Limited probably would not be able to exercise any remedy by way of recoupment against the Steamer Yorkton, and her owners, for the reason that the Steamer Yorkton, as well as the other vessels owned by Mathews Steamship Company, Ltd., are of Canadian registry, and usually trade between Canadian ports, and that it would be highly improbable that this Honorable Court could secure jurisdiction over the Steamer Yorkton, and her owners, or that said vessel, or her owners, could be effectively brought into this litigation by the exercise of Rule 56 of the Admiralty Rules of the United States. That even if the Steamer Yorkton, or other property of her owners, were found within the jurisdiction of this Honorable Court, and were effectively brought into this litigation as parties thereto, and a finding of mutual fault thereafter resulted with a decree of divided damage between the Steamer Yorkton and the Steamer Mantadoc, the liability of the Steamer Yorkton, and her owners, for the amount of cargo [fol. 42] owner's loss and damage so found could be limited under the statutes of the United States to the value of the res plus the pending freight immediately following the disaster.

That as deponent is informed and believes, following said collision the Steamer Yorkton was abandoned by her owners as a constructive total loss as she lay sunk in the waters of Lake Superior; that said vessel has now been raised and towed to Port Arthur, Ontario, but is seriously damaged, and in her present unrepaired condition is of little or no value; that it follows that the value of said vessel immediately following the disaster, exclusive of her pending freight, would be little or nothing, and that if her value in her salved condition, as now existing at the port of Port Arthur, Ontario, be taken there must be deducted therefrom the expenses of salvage of said vessel and towage from the point of disaster to Port Arthur, Ontario, and that by reason of the application of the limitation of liability statute of the United States to cases of foreign owned vessels the result would be that the Steamer Yorkton, and her owners, could escape liability in the United States Court against any recoupment that Paterson Steamships Limited might be entitled to enforce against

said vessel and her owners, and that the Steamer Mantadoc, and her owners, would thus be required to pay the full amount of cargo owner's loss and damage, leaving it without an effective remedy in the premises against the Steamer Yorkton and her owners.

[fol. 43] It follows that Paterson Steamships Limited, if jurisdiction be retained by this Court herein, will not dare to implead the Steamer Yorkton, or her owners, in the pending action, assuming that jurisdiction of said vessel, or her owners, could be secured for the reason that the Steamer Yorkton, and her owners, would thus be enabled to escape the payment of any substantial amount of recoupment decreed against them in favor of Paterson Steamships Limited, as a result of the matters and things set forth in the libel herein, through the exercise of such limitation of liability.

Accordingly, if jurisdiction be retained herein by this Honorable Court, and Paterson Steamships Limited be condemned in accordance with the rule of damage as applied in the United States Courts said Paterson Steamships Limited will be called upon to pay the full amount of loss and damage sustained by libelant as a result of the matters and things complained of in the libel herein, and will be left without an effective remedy against the Steamer Yorkton, and her owners, which may be enforced in the Courts of the United States.

That if jurisdiction be retained by this Honorable Court and the Canadian rule of damage in favor of cargo owner be applied Paterson Steamships Limited by reason of the fact that the officers and members of the crew of the [fol. 44] Steamer Yorkton are citizens and residents of the Dominion of Canada will be unable to exercise jurisdiction over them, and to compel such officers and members of the crew of the Steamer Yorkton to testify herein, and that as a result Paterson Steamships Limited will be left without any effectual remedy towards showing fault upon the part of the Steamer Yorkton as the cause of such collision and resultant damage.

That since it appears upon the face of the libel herein and from the affidavits submitted herewith that both the libelant and respondent are non-resident corporations and subjects of the Dominion of Canada, that the contract of carriage was made by the libelant, a Canadian corpora-

tion, with a Canadian owned and registered vessel, under a bill of lading subject to the Canadian statutes; that the contract of carriage was to be performed between two ports in the Dominion of Canada, and no part of the same was to be executed within the United States, and that it is governed by the law of the Dominion of Canada; that the collision took place between two vessels owned by subjects of the Dominion of Canada, and that nearly, if not all, of the witnesses were residents and citizens of the Dominion of Canada, if jurisdiction be retained by this Honorable Court it will result that this Honorable Court will not be able to do even-handed justice to the parties in accordance with the law of the Dominion of Canada. That, by reason of the matters and things hereinbefore set forth, the con- [fol. 45] venience of the parties will be greatly served by the trial and disposition of the pending cause in the Courts of the Dominion of Canada, rather than within this jurisdiction.

That as appears by the affidavit of Ermin Burton Sutherland, submitted herewith, that an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and will vacate the writ of foreign attachment and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish, and will furnish, a valid bond for a like amount in any action in rem which the present libelant may institute in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the libelant may have.

That when libelant placed its grain on board a Canadian [fol. 46] registered vessel for carriage between two Canadian ports under a contract of carriage subject to Canadian Law, it thereby subjected itself to the law of Canada: and the matter of liability or obligation, and the extent

thereof, as determined by the law of Canada should bind libelant in seeking recovery for the amount of its loss or damage, and the right of Paterson Steamships Limited to have such law and obligation enforced should not be denied. It, therefore, follows that this Court in the exercise of its equitable powers and of the discretion vested in it as to the exercise of jurisdiction herein should decline to take or entertain jurisdiction herein, and should remit the parties to the Courts of the Dominion of Canada taking cognizance of the matters and things hereinbefore set forth.

That this motion is made upon the return day of process issued under the libel herein and prior to respondent having filed any answer to said libel in this Court.

That attached hereto and make a part hereof by reference is a copy of the report of the Dominion Wreck Commissioner made as a result of investigation held at the City of Toronto on July 23rd, 24th and 25th, 1930, into the circumstances attending the collision between the SS. Yorkton and the SS. Mantadoc. That reference is hereby made to such report in full for the purpose of showing to the Court the apparent fault upon the part of the Master of the Steamer Yorkton as well as that upon the part of [fol. 47] the Steamer Mantadoc, as a result of which such collision occurred, and that said report is hereby referred to in full and made a part hereof.

That the Rules of the Road for the Great Lakes as promulgated by Order in Council of the 4th February, 1916, and as issued by Department of Marine and Fisheries, Canada, violations of which are stated in said report to have been the cause of said collision, read as follows:

"Rule 19. Every vessel shall, in thick weather by reason of fog, mist, falling snow, heavy rainstorms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other."

"Rule 22. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot

so in doubt shall immediately signify the same by giving the danger signal of five or more short and rapid blasts of the whistle; and if both vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway, and, if necessary, stopped and reversed, until the proper signals [fol. 48] are given, answered, and understood, or until the vessels shall have passed each other."

"Rule 23. Steam vessels are forbidden to use what has become technically known among pilots as "cross signals"—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in the rules, which for any reason he deems injudicious to comply with, instead of answering it with a cross signal, shall at once sound the danger signals and observe the rule applying thereto (Rule 22)."

"Rule 30. When two steamers are approaching each other at right angles or obliquely so as to involve risk or collision, other than when one steamer is overtaking another the steamer which has the other on her own port side shall hold her course and speed; and the steamer which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steamer, or, if necessary to do so, slacken her speed or stop or reverse. The steamer having the other on her own port bow shall blow one blast of her whistle as a signal of her intention to cross the bow of the other, holding her course and speed, which signal shall be promptly answered by the other steamer [fol. 49] by one short blast of her whistle as a signal of her intention to direct her course to starboard so as to cross the stern of the other steamer or otherwise keep clear."

"If from any cause whatever the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steamers shall be stopped, and backed if necessary, until signals for passing with safety are made and understood."

"Rule 32. When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other."

"Rule 34. Where, by any of the rules herein prescribed, one of the two vessels shall keep out of her way, the other shall keep her course and speed."

"Rule 35. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

"Rule 37. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

[fol. 50] "Rule 38. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Wherefore deponent prays for an order and decree of this Court granting the relief sought by respondent upon this motion, viz., that the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action; that the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein, and that the Court remit the libelant to its remedies in the Courts of the Dominion of Canada; that the Court direct that the bond and stipulation heretofore given and filed herein by Paterson Steamships Limited, with the American Surety Company of New York, as surety, be cancelled and discharged of record, and that the respondent have such other and further relief as may be incidental thereto or proper in the premises.

Ellis H. Gidley.

Sworn to before me this 8th day of September, 1930,
Arthur E. Otten, Notary Public, Erie Co., N. Y.

[fol. 51] REPORT OF DOMINION WRECK COMMISSIONER

Re S. S. "Yorkton" vs. S. S. "Mantadoc" Collision

In the matter of a formal investigation held in the City Hall, Toronto, on July 23rd, 24th and 25th, 1930, into the circumstances attending the collision between the S. S. "Yorkton" and the S. S. "Mantadoc" off Whitefish Point, Lake Superior, on or about the 10th July, 1930, resulting in the sinking of the S. S. "Yorkton."

The Court was presided over by Captain L. A. Demers, F. R. A. S., Dominion Wreck Commissioner, assisted by Captain J. B. Foote and Captain J. H. Solery, acting as Nautical Assessors.

Mr. R. C. Holden was present on behalf of the Owners and Officers of the "Mantadoc"; Mr. L. C. Hinslea, representing the "Yorkton" and her officers; Mr. A. J. McElhinney looked after the interests of the Underwriters of the cargo of the "Yorkton."

On the 23rd of July the Master of the "Yorkton" Captain F. M. Burmister, certificate No. 11689, was examined and cross examined. He stated as follows: that the "Yorkton," owned by the Mathews Steamship Company of Toronto, was a steel built vessel, a single screw, of a speed of 9.5 miles an hour; she carried 20 of a crew, 2 certificated Deck Officers, 2 Engineers; her length was 257 feet, [fol. 52] breadth 42 feet 8 inches, draft at time of casualty 13 feet 6 inches forward and 14 feet 5 inches aft; she had 2 compasses which had been adjusted and gave a maximum deviation of one-half a degree West on the starboard; she was loaded with grain and was bound from Port Arthur to Montreal.

On the 10th of July he had passed Caribou Island which was seen at 5.54 P. M. log read, 51 miles being indicated, and the distance 8½ miles. At 9.08 p. m. log reading was 178 miles; at 10.37 the engines were checked at slow and log showed 189 miles, which was the last reading observed, fog came on thick. The course steered was SE by E¼E. He heard a Steamer's whistle ten to twelve times about four points on his starboard bow. His whistle omitted regularly the usual three blasts. Some moments before the collision he avers he gave the order to starboard, then steady, after having starboarded and having sounded three

times the two blasts, he saw a glimpse of the red light of a steamer, then the green and immediately ordered full speed ahead and a hard-to-port helm, the steamer, which proved to be the "Mantadoc," crashing into his starboard quarter in the region of the engine room, the ship listing considerably through the force or violence of the impact. He noticed that the ship was filling rapidly in the engine room and fire hold. Eventually the ship was towed by the "Mantadoc" to Whitefish Bay, the crew having been conveyed to the rescuing vessel. When she grounded she was left and abandoned.

[fol. 53] Prior to the collision and hearing what proved the "Mantadoc's" whistle, he had heard other signals. He thought he had heard also Whitefish Point fog horn, twice, but could not tell nor did not know the nature of that Point's fog signal, the intervals nor the number of blasts. Both Master and Second Mate were constantly within the wheel house, three windows being opened, also the starboard door. The Watchman kept a lookout on the bow deck.

"Mantadoc"

The evidence of C. B. Kirk, Master of the "Mantadoc" Certificate No. 8001, followed being to the effect, that: the S. S. "Mantadoc" owned by the Paterson Steamships Company, was a steel built vessel of 4466 gross, 2060 net tons register; carrying 22 men, 2 certificated Deck Officers; was 416 feet long, 50 feet beam; draft 18 feet 7 inches forward, 19 feet 4 inches aft; single screw of a speed of 10 miles; that he had loaded at Lorain some 7,000 tons of coal and was bound to Jackfish Bay. Leaving the Soo he had shaped a course N. W. by N. 7/8 N, Whitefish Point was passed at 9:55 standard time; fog set down thick, the engines were checked to half speed; heard twice the signals of two blasts from the "Yorkton" which appeared to be about one point on port bow, also had heard her three blast fog signal previously approaching. He ordered hard-to-starboard and full ahead when the "Yorkton" came in [fol. 54] sight at about 100 feet distant, the ship crashing into the starboard quarter of the "Yorkton," and full speed astern was given. The ship having cleared the "Yorkton" after some maneuvering he sent the boat to rescue the crew of the "Yorkton," after which fastening

to the side he towed the "Yorkton" to soundings where she was abandoned, bringing the crew to Sault Ste. Marie. No alarm signals were sounded nor was there a two blast signal given to correspond to the hard-to-starboard helm. He also stated that the compasses had not been adjusted since he had been in command, a season and one-half.

The other witnesses examined did not shed further light, nor alter in any material way the evidence of each Master.

After hearing the pleadings of the three Counsel, the Court adjourned at 4:30 p. m. July 25th, taking the case en delivere.

Summary

The evidence of each vessel indicates that there was a lookout kept both by the Masters and Second Officers, as well as the Watchmen on the bow deck; that the "Yorkton" was going at a slow speed or was checked, as it is termed, which, at the number of revolutions stated, would give her a speed through the water of 3 to 4 statute miles. To all intents and purposes the speed was moderate in [fol. 55] view of the dense fog which enveloped and surrounded her, and in accordance with the first sentence of Rule 19.

The fog signals of the S. S. "Mantadoc" were heard ten to twelve times at regular intervals. If so, there was a period of eight to ten minutes elapsed between the first sound and the collision, and it is averred it was heard constantly at about four points on the starboard bow. The Master said so. My notes show that he thought she was a crossing vessel. If such a thought existed it did not require much reflection or calculation to come to a conclusion that the vessel heard was crossing from starboard to port. At any rate the fact that it was determined that the bearing did not change, a danger existed and the paramount duty of the "Yorkton's" Master was to stop his engines and bring his ship to bare steerageway, maintaining his course till such a time as the heading of the "Mantadoc" would have been determined, then, if found converging and crossing, having her on his starboard bow, it was his duty to keep clear.

The error, the mistake and blunder was in blowing a two-blast signal, starboarding the helm without first having

determined the direction of the vessel which proved to be the "Mantadoc." Again when the "Mantadoc" replied to the two blast signal by a three blast signal, an alarm or danger signal should have been instantly given, instead the "Yorkton" followed the two blasts by a three-blast signal, [fol. 56] significantly conveying the message that the helm had been steadied, then followed by another two blast signal, indicating a further alteration of the helm to starboard impelling the "Yorkton" further to port—very mystifying —then when the "Mantadoc" appeared in sight a full speed ahead was ordered with a hard-to-port helm. The intention was good, but the movement could not be expected to be effective, and yet, had the "Mantadoc" been under moderate slow speed, it is very probable that a contact would have been avoided at least minimized. On this last movement no criticism is intended, as the order, well meant perhaps, was done in the agony of the moment.

From the above, I deduce that the Master failed to observe the letter and spirit of Rule 19, likewise that of Rules 30, 32 and 35.

If the "Mantadoc's" whistle was heard on the starboard at four points or more, the danger line would have been passed, therefore entitling him to a maintenance of speed and course. I doubt, in view of the evidence which indicates that but a casual observation was made of the bearing by compass, that the bearings were as stated. The fact that the bearings remained the same during an approximate three minutes proves that the "Mantadoc" was a crossing vessel, therefore, it was incumbent on the "Yorkton" to keep out of the way in accordance with the precept of Rule 30. Having heard, as alleged, the fog [fol. 57] signals ten times or more, a more or less accurate and guiding bearing could have been obtained.

With respect to the "Mantadoc" whilst her speed would be considered moderate when away from the vicinity of ships, in this instance upon hearing a two blast signal one point on her bow which was significant and should have been significant to any ordinary mind, his duty was to sound a danger signal, stop his engines and reverse, bringing his ship if possible to a standstill or to bare steerageway. I recognize the fact that according to Rule 34, she would be expected to keep her course and speed, and evidently it was

the intention when the two blast signal of the "Yorkton" was answered by a continuation of a three blast but when a second two blast from the "Yorkton" was heard, which was accepted; owing to special circumstances, Rules 37 and 38, a departure from these rules was imperative, it was evidently attempted by an order to starboard a point. Why one Point? A hard-to-starboard, a danger signal and a full speed astern should have been the order. There were heard three signals of two blasts, it is evident the starboarding was done at the last signal, and I have in mind that it was done and begun when the "Yorkton" appeared in sight—the hard-to-starboard and full speed ahead at that moment. Under the circumstances, it was performed in the agony of collision and was, in view of the situation, a proper one; it [fol. 58] had the effect of minimizing the injuries by striking obliquely. How the port bow plates were affected in the impact could not be explained and it remains a mystery to the Court. In this instance also there seems to have been a remissness to obtain by the means available a proper bearing of the sounds heard. I am of opinion that the "Mantadoc" did not meet the requirements of Rules 19 and 22, second paragraph of Rule 23.

The last paragraph of Rule 30 can be included as an obligation which has not been met, for this reason; it is averred that the "Yorkton" was one point on the port bow; her signal of two blasts indicating she was crossing "Mantadoc's" bow was contrary to regulations. Objections should have been conveyed to the "Yorkton" by means of the danger signal, and an immediate order of reversing engines simultaneously given. Rules 19, 22, 23, 30, 37 and 38, were violated.

Further, I consider that one point deviation on any course which has been found to exist, should have induced an adjustment of compasses, whereby a deviation curve would have indicated the variation of errors on each and every point. I have in mind that the courses given were not exactly steered or the errors found not applied. Having no proofs in that respect, I refrain from studying the courses and the place of the collision which, however, is immaterial, as the essential factors which led to this casualty is a viola- [fol. 59] tion of certain Rules of the Road for the Great Lakes by each ship.

The above being determined, it necessitates the rendering of the following Judgment:

Judgment

The Court, having carefully weighed and reviewed the evidence adduced, for the reasons given in the analysis which criticizes both ships, finds, Captain F. M. Burmister of the S. S. "Yorkton" in default and his Certificate No. 11689 is suspended for the balance of the year 1930; also finds Captain C. B. Kirk of the "Mantadoc" in default to the same degree and his Certificate No. 8001 is suspended till December 31st, 1930.

As the evidence does not demonstrate any wilful neglect, obstinacy or indifference, but a wrong interpretation of the meaning of the Rules of the Road, and their application due to lack of experience, being viewed by the Court as a culpable error of judgment, for those reasons, it is recommended that Mate's Certificate be issued to each Master during the interim of suspension.

Read in open Court at Ottawa this 5th day of August, 1930.

(Sgd.) L. A. Demers, Dominion Wreck Comm.

Concurred in by
(Sgd.) J. B. Foote, (Sgd.) J. H. Solery, Nautical Assessors.

[fol. 60] At the conclusion of the hearing of evidence the following questions were read and submitted for and on behalf of the Department of Marine, for the opinion of the Court.

1. What were the weather conditions prevailing at the time of and previous to the collision?

2. Was a good and proper look-out maintained on board of each vessel?

3. Did each vessel comply with the provisions of the Rules of the Road for the Great Lakes?

4. What was the cause of the collision?

5. Was the collision caused through the wrongful act or default of the Master, Officer of the Watch, or any member

of the crew of the S. S. "Yorkton" or of the Master, Officer of the Watch or any member of the crew of the S. S. "Mantadoc," or anyone or more of them, and if so, which of them?

Answers to Questions by the Court

1. Foggy.
2. Good look-out.
3. No.
4. See Report and Judgment.
5. Default of Master of each vessel.

——, Dominion Wreck Commissioner.

[fol. 61] In United States District Court

Libel of British Empire Grain Company, Limited

To the Honorable the District Judges of the United States for the Western District of New York:

The libel of British Empire Grain Company, Limited, in a cause of collision and damage, civil and maritime, against Paterson Steamships Limited, respectfully shows and alleges as follows:

First. That libellant is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the Laws of the Dominion of Canada.

Second. That Paterson Steamships Limited is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the Laws of the Dominion of Canada, and is and at all times hereinafter mentioned was the owner and operator of the Steamer "Mantadoc."

Third. That heretofore and on or about the 9th day of July, 1930, the libellant shipped on board the Steamer "Yorkton" at Port Arthur, Ontario, 36,400 bushels of oats in good order and condition, to be transported in said

steamer and delivered to the order of libellant at Montreal, Canada, and that libellant was and at all times herein mentioned was the sole owner of said oats.

Fourth. That the said Steamer "Yorkton" sailed from Port Arthur on July 9, 1930 with said shipment of oats on [fol. 62] board, and that while on said voyage and at about 11:22 P. M. when about 3 miles northwest of Whitefish Point on Lake Superior, in American waters, in a dense fog, said Steamer "Yorkton" was struck by the Steamer "Mantadoc" so that the Steamer "Yorkton" commenced to fill with water, and the water flooded her fires and she commenced to sink and after being taken in tow by the Steamer "Mantadoc" she did sink on the beach, a short distance below Whitefish Point on the American shore, and the said shipment of oats became a total loss.

Fifth. That at the time of said collision said Steamer "Yorkton" was running under reduced speed and those on board the Steamer "Yorkton" had made out the fog signals of a steamer that proved to be the "Mantadoc," that said signals bore on the starboard side of the Steamer "Yorkton," and that the steamer "Yorkton" directed her course to port in order to keep out of the way of the steamer whose signals had been heard, but that suddenly the Steamer "Mantadoc" loomed up in the fog a short distance off, coming at a high and unlawful rate of speed, and although those on the Steamer "Yorkton" endeavored to throw her stern away from the oncoming Steamer "Mantadoc," the Steamer "Mantadoc" nevertheless came on and with her stem crashed into the starboard side of the Steamer "Yorkton" a short distance forward of her stern, and opened up the side of the Steamer "Yorkton" so that she commenced to fill and sink.

[fol. 63] Sixth. And not being informed as to all that took place on board said steamers, and reserving the right to urge such other and further faults as may appear upon a full hearing of this cause, that respondent is at fault for said collision in that those in charge of the navigation of the Steamer "Mantadoc" were guilty of faults and negligence, in that they were careless and inattentive to their duties, in that no proper lookout was maintained, in that said steamer was navigated at too great a speed in a fog,

in that she did not give proper heed to the signals of the Steamer "Yorkton," in that she did not stop and reverse her engines in time as should have been done, all in violation of the law and pilot rules.

Seventh. That said collision was not the result of any fault on the part of libellant; that by reason of the premises, libellant has sustained damage in the sum of Twenty Thousand Dollars ($20,000.00).

Eighth. That respondent has goods and chattels within this district, to-wit: the Steamer "Lachinedoc."

Ninth. That all and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that citations in due form of law, according to the course of this Honorable Court in [fol. 64] causes of admiralty and maritime jurisdiction, may issue against Paterson Steamships Limited, and that it by its officers may be compelled to appear and answer upon oath all and singular the matters aforesaid, and if the said corporation cannot be found within this District, that an attachment issue against its goods and chattels, and that this Honorable Court will be pleased to decree the payment of the damages aforesaid, with the costs, and libellant may have such other and further relief as to law and justice may appertain.

Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, N. Y., and Bigham, Englar, Jones & Houston, 64 Wall Street, New York, N. Y., Proctors for Libellant.

[fol. 65] *Duly sworn to by Laurence E. Coffey. Jurat omitted in printing.*

[fol. 66] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libelant,

vs.

PATERSON STEAMSHIPS LIMITED, Respondent.

NOTICE OF APPEARANCE

Sirs: Please take notice that Paterson Steamships Limited, the respondent above named, appears in this action and that we are retained as its proctors.

Dated Buffalo, New York, July 22d, 1930.

Yours, etc., Stanley & Gidley, Proctors for Respondent. Office and Post-office address: 1042 Marine Trust Bldg., Buffalo, N. Y.

To Brown, Ely & Richards and Bigham, Englar, Jones & Houston, Proctors for Libelant.

[fol. 67] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

NOTICE OF MOTION TO DISMISS, ETC.

SIRS: Please take notice that upon the annexed affidavit of Ermin Burton Sutherland, sworn to the 6th day of September, 1930, and the annexed affidavit of William W. Hall, sworn to the 4th day of September, 1930, and the annexed affidavit of Rufus Clement Holden, Jr., sworn to the 4th day of September, 1930, and the annexed affidavit of George D. MacDonald, sworn to the 8th day of September, 1930, and the annexed affidavit of Ellis H. Gidley, sworn to the 8th day of September, 1930, and upon the libel heretofore filed herein and the writ of foreign attachment heretofore issued out of this Court, and the return of the Marshal thereto, and upon respondent's exceptions to said libel,

and upon the suggestion of Paterson Steamships Limited filed herewith, a motion will be made by the undersigned [fol. 68] at a stated session of this Court appointed to be held for the disposition of maritime causes in the United States District Court room in the Federal Building in the City of Buffalo, New York, on the 15th day of September, 1930, (said day being the return day of process issued under the libel filed in the above entitled action) at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order and decree of this Honorable Court granting and decreeing to Paterson Steamships Limited, respondent in the above entitled action, the following relief:

1. That the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action.

2. That the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Steamer Lachinedoc, the property of Paterson Steamships Limited, on or about the 21st day of July, 1930.

3. That the Court remit libelant to its remedies in the Courts of the Dominion of Canada.

4. That the Court direct that the bond and stipulation heretofore given and filed herein by Paterson Steamships Limited with American Surety Company of New York, as surety, for the release of the Steamer Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of [fol. 69] libelant, be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation.

5. That the Court grant a decree to Paterson Steamships Limited for such other and further relief herein as may be incidental thereto or proper in the premises.

Yours, etc., Stanley & Gidley, Proctors for Respondent, Paterson Steamships, Limited.

To May C. Sickmon, Clerk of the Court; Brown, Ely & Richards, and Bigham, Englar, Jones & Houston, Proctors for Libelant.

IN UNITED STATES DISTRICT COURT

LIBEL OF HENRY K. STARNES

To the Honorable, the District Judges of the United States for the Western District of New York:

The libel of Henry K. Starnes, doing business as H. K. Starnes & Company, in a cause of collision and damage, civil and maritime, against Paterson Steamships Limited, respectfully shows and alleges as follows:

[fol. 70] First. That libellant resides in the City of Montreal, Canada, and is there engaged in business as H. K. Starnes & Company.

Second. That Paterson Steamships Limited is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the Laws of the Dominion of Canada, and is and at all times hereinafter mentioned was the owner and operator of the Steamer "Mantadoc."

Third. That heretofore and on or about the 9th day of July, 1930, the libellant shipped on board the Steamer "Yorkton" at Port Arthur, Ontario, 15,000 bushels of Oats in good order and condition, to be transported in said steamer, and that libellant was and at all times herein mentioned was the sole owner of said Oats.

Fourth. That the said Steamer "Yorkton" sailed from Port Arthur on July 9, 1930 with said shipment of Oats on board, and that while on said voyage and at about 11:22 P. M. when about 3 miles northwest of Whitefish Point on Lake Superior, in American waters, in a dense fog said Steamer "Yorkton" was struck by the Steamer "Mantadoc" so that the Steamer "Yorkton" commenced to fill with water, and the water flooded her fires and she commenced to sink and after being taken in tow by the Steamer "Mantadoc" she did sink on the beach, a short distance below Whitefish Point on the American shore, and the said shipment of Oats became a total loss.

Fifth. That at the time of said collision said Steamer "Yorkton" was running under reduced speed and those

[fol. 71] on board the Steamer "Yorkton" had made out the fog signals of a steamer that proved to be the "Mantadoc", that said signals bore on the starboard side of the Steamer "Yorkton", and that the Steamer "Yorkton" directed her course to port in order to keep out of the way of the steamer whose signals had been heard, but that suddenly the Steamer "Mantadoc" loomed up in the fog a short distance off, coming at a high and unlawful rate of speed, and although those on the Steamer "Yorkton" endeavored to throw her stern away from the oncoming Steamer "Mantadoc", the Steamer "Mantadoc" nevertheless came on and with her stem crashed into the starboard side of the Steamer "Yorkton" a short distance forward of her stern, and opened up the side of the Steamer "Yorkton" so that she commenced to fill and sink.

Sixth. And not being informed as to all that took place on board said steamers, and reserving the right to urge such other and further faults as may appear upon a full hearing of this cause, that respondent is at fault for said collision in that those in charge of the navigation of the Steamer "Mantadoc" were guilty of faults and negligence, in that they were careless and inattentive to their duties, in that no proper lookout was maintained, in that said steamer was navigated at too great a speed in a fog, in that she did not give proper heed to the signals of the Steamer "Yorkton", in that she did not stop and reverse her engines in time as should have been done, all in violation of the law and pilot rules.

[fol. 72] Seventh. That said collision was not the result of any fault on the part of libellant; that by reason of the premises, libellant has sustained damage in the sum of Seven Thousand Five Hundred Dollars ($7,500.00).

Eighth. That respondent has goods and chattels within this district, to-wit: the Steamer "Lachinedoc."

Ninth. That all and singular the premises are true and within the admirality and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that citations in due form of law, according to the course of this Honorable Court in

causes of admiralty and maritime jurisdiction, may issue against Paterson Steamships Limited, and that it by its officers may be compelled to appear and answer upon oath all and singular the matters aforesaid, and if the said corporation cannot be found within this District, that an attachment issue against its goods and chattels, and that this Honorable Court will be pleased to decree the payment of the damages aforesaid, with the costs, and libellant may have such other and further relief as to law and justice may appertain.

Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, N. Y., and Bigham, Englar, Jones & Houston, 64 Wall Street, New York, N. Y., Proctors for Libellant.

[fol. 73] *Duly sworn to by Laurence E. Coffey. Jurat omitted in printing.*

[fol. 74] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent

NOTICE OF APPEARANCE

SIRS: Please take notice that Paterson Steamships Limited, the respondent above named, appears in this action and that we are retained as its proctors.

Dated Buffalo, New York, July 22nd, 1930.

Yours, etc., Stanley & Gidley, Proctors for Respondent. Office and Post-Office address: 1042 Marine Trust Building, Buffalo, N. Y.

To Brown, Ely & Richards and Bigham, Englar, Jones & Houston, Proctors for Libelant.

[fol. 75] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admirality

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

NOTICE OF MOTION TO DISMISS, ETC.

SIRS: Please take notice that upon the annexed affidavit of Ermin Burton Sutherland, sworn to the 6th day of September, 1930, and the annexed affidavit of William W. Hall, sworn to the 4th day of September, 1930, and the annexed affidavit of Rufus Clement Holden, Jr., sworn to the 4th day of September, 1930, and the annexed affidavit of George D. MacDonald, sworn to the 8th day of September, 1930, and the annexed affidavit of Ellis H. Gidley, sworn to the 8th day of September, 1930, and the libel heretofore filed herein, and upon respondent's exceptions to said libel, and upon the suggestion of Paterson Steamships Limited filed herewith, a motion will be made by the undersigned, at a stated session of this Court appointed to be held for the disposition of maritime causes in the United States District Court room in the Federal Building, in the City of [fol. 76] Buffalo, New York, on the 15th day of September, 1930 (said day being the return day of process issued under the libel filed in the above entitled action) at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order and decree of this Honorable Court granting and decreeing to Paterson Steamships Limited, respondent in the above entitled action, the following relief:

1. That the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action.

2. That the Court dismiss the libel herein.

3. That the Court remit libelant to its remedies in the Courts of the Dominion of Canada.

4. That the Court direct that the bond and stipulation heretofore given and filed herein by Paterson Steamships Limited with American Surety Company of New York, as surety, be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation.

5. That the Court grant a decree to Paterson Steamships Limited for such other and further relief herein as may be incidental thereto or proper in the premises.

Yours, etc., Stanley & Gidley, Proctors for Respondent Paterson Steamships, Limited.

[fol. 77] To May C. Sickmon, Clerk of the Court; Brown, Ely & Richards, and Bigham, Englar, Jones & Houston, Proctors for Libelant.

In United States District Court, Western District of New York

In Admiralty

Henry K. Starnes, Doing Business as "H. K. Starnes & Co.," Libelant,

against

Paterson Steamships, Limited, Respondent

Suggestion

To the Honorable the Judges of the United States District Court for the Western District of New York:

Paterson Steamships Limited, a corporation of the Dominion of Canada, named as respondent herein, respect-[fol. 78] fully suggests to this Honorable Court that this Honorable Court ought not entertain or exercise further jurisdiction over the above entitled action, for the reason that it appears upon the face of the libel herein and from the moving papers attached hereto, that the matters and things complained of by libelant which is a citizen and subject of the Dominion of Canada, against respondent, which is also a citizen and subject of the Dominion of Canada, arose out of a collision between a vessel of Canadian reg-

istry with another vessel of Canadian registry, while carrying cargo owned by a Canadian citizen and being transported from one Canadian port to another Canadian port, all of which matters and things are properly the subjects of Canada, in accordance with the statutes and rules of law of the Dominion of Canada in such case made and provided.

Wherefore Paterson Steamships Limited prays that this Honorable Court will refuse to entertain or exercise further jurisdiction herein; that the libel herein be dismissed, and the bond heretofore given herein be cancelled of record; and that libelant be remitted to the Courts of the Dominion of Canada for the exercise of the remedies there afforded it.

Paterson Steamships Limited, by E. B. Sutherland, Secretary.

[fol. 79] *Duly sworn to by E. B. Sutherland. Jurat omitted in printing.*

[fol. 80] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

EXCEPTIONS TO LIBEL

To the Honorable the Judges of the United States District Court for the Western District of New York:

The exceptions of Paterson Steamships Limited, respondent in the above entitled action, to the libel of Henry K. Starnes, doing business as H. K. Starnes & Co., alleges:

I. That upon the facts alleged in the libel herein this Honorable Court ought not to entertain or exercise further jurisdiction over the pending action.

II. That the matters and things set forth in the libel herein constitute a matter of liability or of obligation admeasured and determinable according to the laws and statutes of the Dominion of Canada and cognizable by the Courts of the Dominion of Canada.

[fol. 81] III. That upon the matters and things set forth in the libel herein, libelant ought to be remitted to the Courts of the Dominion of Canada.

Dated Buffalo, New York, September 2nd, 1930.

Stanley & Gidley, Proctors for Respondent, Paterson Steamships, Limited.

In United States District Court, Western District of New York

In Admiralty

Henry K. Starnes, Doing Business as "H. K. Starnes & Co.," Libelant,

against

Paterson Steamships, Limited, Respondent

Affidavit of Ermin Burton Sutherland

Dominion of Canada,
Province of Ontario, ss:

Ermin Burton Sutherland, being duly sworn, deposes and says that he is a resident of Fort William, Ontario, and is [fol. 82] the Secretary of Paterson Steamships Limited, respondent in the above entitled action.

That Paterson Steamships Limited is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, having its principal office at Fort William, Ontario. That Paterson Steamships Limited is engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters, and that said Paterson Steamships Limited, is the owner and operator of some thirty lake and Welland Canal freight carrying vessels; that among the vessels owned and operated by Paterson Steamships Limited is the Steamer

Mantadoc, a vessel of the Dominion of Canada, registered at the Port of Fort William, and bearing Canadian registry No. 116580.

That it is alleged in the libel herein that libelant resides in the City of Montreal, Quebec, and is there engaged in business as H. K. Starnes & Co.

That it is alleged in the libel herein that libelant was the owner of a portion of the cargo of grain laden and being transported on board the Steamer Yorkton on a voyage from Port Arthur to Montreal on or about the 9th day of July, 1930; that it is also alleged in said libel that the Steamer Yorkton and the Steamer Mantadoc were in collision on Lake Superior off Whitefish Point on the evening of the 9th day of July, 1930, and that as a result of said [fol. 83] collision the Steamer Yorkton was later beached in a sinking condition, resulting in an alleged total loss of libelant's portion of her cargo, for which loss recovery is sought in this action for the sum of $7,500.00.

That the Steamer Yorkton is also a Canadian freight carrying vessel, being registered at the Port of Toronto, Ontario, and bearing Canadian Registry No. 132060. That the Steamer Yorkton was at the time of said collision and is owned and operated by the Mathews Steamship Company, Limited, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, or the laws of the Province of Ontario, and having its principal office in the City of Toronto, Ontario, and engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters.

That it is alleged in the libel herein that that portion of the cargo owned by libelant, which was being carried and transported upon the Steamer Yorkton at the time of said collision was shipped on board said vessel at Port Arthur, Ontario, on or about the 9th day of July, 1930, for carriage and transportation to and delivery at Montreal, Quebec. That at the time of the shipment and loading of libelant's said grain on board the Steamer Yorkton a bill of lading was issued therefor on behalf of said vessel at Fort William, Ontario, which said bill of lading acknowledged the shipment of said grain on board said Steamer Yorkton for [fol. 84] carriage and transportation to and delivery at Montreal; that the contract for the carriage of said cargo was and is subject to, and governed by the laws of the

Dominion of Canada, where the said contract was made and where it was to be performed.

That the licensed officers in charge of both the Steamers Mantadoc and Yorkton were citizens and residents of the Dominion of Canada; that most, if not all, of the members of the crews of both vessels were likewise citizens and residents of the Dominion of Canada.

That this action was begun by the filing of a libel in this Honorable Court on or about the 22nd day of July, 1930; that the Steamer Lachinedoc, a vessel of Canadian registry, owned and operated by Paterson Steamships Limited, had been attached by the Marshal of this Court at the Port of Buffalo on the previous day upon two writs of foreign attachment, issued upon the prayer of Canada Malting Company, Ltd., and British-Empire Grain Company Limited respectively, libelants, in actions pending in this Court against Paterson Steamships Limited. That as deponent is informed by Messrs. Stanley & Gidley, local counsel for Paterson Steamships Limited, and verily believes, it was agreed that bond should be filed in this pending action in lieu of attachment therein of the Steamer Lachinedoc, and that such bond was filed at the same time bonds were filed to release said vessel from the writs of foreign attachment [fol. 85] granted in said other actions, as is more fully set forth in deponent's affidavit made a part of the moving papers in said other actions.

That no instructions were given by Paterson Steamships Limited that a general appearance be entered herein in its behalf, and Paterson Steamships Limited in filing said bonds to procure release of the Steamer Lachinedoc did not intend thereby to waive any of its rights with respect to contesting the question of the exercise of jurisdiction by this Honorable Court over the questions of fault and damage arising out of said collision between the Steamer Yorktown and the Steamer Mantadoc; that if a general appearance was entered herein it was so entered without the knowledge or authority of said Paterson Steamships Limited. That following said collision an investigation as required by law was duly held and conducted by the Wreck Commissioner of the Dominion of Canada, and that as a result thereof said Wreck Commissioner has determined and found the masters of both the Steamer Mantadoc and

the Steamer Yorkton guilty of fault, resulting in said collision, and has suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

That Paterson Steamships Limited have retained Messrs. Meredith, Holden, Heward & Holden, barristers and solicitors of Montreal, as its legal representatives, concerning the [fol. 86] various questions arising out of said collision; that, as deponent is advised by Messrs. Meredith, Holden, Heward & Holden, and verily believes, if jurisdiction of the above entitled action be retained by this Court that under all the circumstances of this case this Honorable Court will be unable to do evenhanded justice between the parties in accordance with the Canadian Law, to which all of the parties and vessels involved are subject.

That an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company, Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and will vacate the writ of foreign attachment and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish and will furnish a valid bond for a like amount in any action in rem which the present libelant may institute in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the Libelant may have.

[fol. 87] That the Steamer Yorkton, though now raised, has not yet been repaired, and that in deponent's opinion in her present unrepaired condition said vessel is of little or no value as she now lies at Fort William, Ontario.

Wherefore deponent prays that an order and decree of this Court be made refusing to take and entertain jurisdiction of the pending action, dismissing the libel and vacating the writ of foreign attachment heretofore served, cancelling the bond given for the release of the Steamer Lachinedoc, remitting the libelant to its remedies in the

Courts of the Dominion of Canada, and for such other and further relief as may be just and proper in the premises.

E. B. Sutherland.

Subscribed and sworn to before me this 6th day of September, 1930. F. R. Morris, Notary Public. Life Commission. (Notarial Seal.)

[fol. 88] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF WILLIAM WALTER HALL

DOMINION OF CANADA,
Province of Ontario, ss:

William Walter Hall, being duly sworn, deposes and says that he is a resident of Winnipeg, Manitoba, and is General Manager of Paterson Steamships Limited, respondent in the above entitled action.

That Paterson Steamships Limited is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, having its principal office at Fort William, Ontario. That Paterson Steamships Limited is engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters, and that said Paterson Steamships Limited is the owner and operator of some thirty lake and Welland Canal [fol. 89] freight carrying vessels; that among the vessels owned and operated by Paterson Steamships Limited is the Steamer Mantadoc, a vessel of the Dominion of Canada, registered at the Port of Fort William, and bearing Canadian Registry No. 116580.

That it is alleged in the libel herein that libelant resides in the City of Montreal, Quebec, and is there engaged in business as H. K. Starnes & Co.

That it is alleged in the libel herein that libelant was the owner of a portion of the cargo of grain laden and being

transported on board the Steamer Yorkton on a voyage from Port Arthur to Montreal on or about the 9th day of July, 1930; that it is also alleged in said libel that the Steamer Yorkton and the Steamer Mantadoc were in collision on Lake Superior off Whitefish Point on the evening of the 9th day of July, 1930, and that as a result of said collision the Steamer Yorkton was later beached in a sinking condition, resulting in an alleged total loss of libelant's portion of her cargo, for which loss recovery is sought in this action for the sum of $7,500.00.

That the Steamer Yorkton is also a Canadian freight carrying vessel, being registered at the Port of Toronto, Ontario, and bearing Canadian Registry No. 132060. That the Steamer Yorkton was at the time of said collision and [fol. 90] is owned and operated by the Mathews Steamship Company, Limited, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, or the laws of the Province of Ontario, and having its principal office in the City of Toronto, Ontario, and engaged in the business of water transportation upon the Great Lakes, St. Lawrence river and their connecting waters.

That it is alleged in the libel herein that that portion of the cargo owned by libelant, which was being carried and transported upon the Steamer Yorkton at the time of said collision was shipped on board said vessel at Port Arthur, Ontario, on or about the 9th day of July, 1930, for carriage and transportation to and delivery at Montreal, Quebec. That at the time of the shipment and loading of libelant's said grain on board the Steamer Yorkton a bill of lading was issued therefor on behalf of said vessel at Fort William, Ontario, which said bill of lading acknowledged the shipment of said grain on board said Steamer Yorkton for carriage and transportation to and delivery at Montreal; that the contract for the carriage of said cargo was and is subject to and governed by the laws of the Dominion of Canada, where the said contract was made and where it was to be performed.

That the licensed officers in charge of both the Steamers Mantadoc and Yorkton were citizens and residents of the [fol. 91] Dominion of Canada; that most, if not all, of the members of the crews of both vessels were likewise citizens and residents of the Dominion of Canada.

That this action was begun by the filing of a libel in this Honorable Court on or about the 22nd day of July, 1930; that the Steamer Lachinedoc, a vessel of Canadian registry, owned and operated by Patterson Steamships Limited, had been attached by the Marshal of this Court at the Port of Buffalo on the previous day upon two writs of foreign attachment, issued upon the prayer of Canada Malting Company, Ltd., and British Empire Grain Company Limited respectively, libelants, in actions pending in this Court against Paterson Steamships Limited. That as deponent is informed by Messrs. Stanley & Gidley, local counsel for Paterson Steamships Limited, and verily believes, it was agreed that bond should be filed in this pending action in lieu of attachment therein of the Steamer Lachinedoc, and that such bond was filed at the same time bonds were filed to release said vessel from the writs of foreign attachment granted in said other actions, as is more fully set forth in deponent's affidavit made a part of the moving papers in said other actions.

That no instructions were given by Paterson Steamships Limited that a general appearance be entered herein in its behalf, and Paterson Steamships Limited in filing said bonds to procure release of the Steamer Lachinedoc did not [fol. 92] intend thereby to waive any of its rights with respect to contesting the questions of the exercise of jurisdiction by this Honorable Court over the questions of fault and damage arising out of said collision between the Steamer Yorkton and the Steamer Mantadoc; that if a general appearance was entered herein it was so entered without the knowledge or authority of said Paterson Steamships Limited. That following said collision an investigation as required by law was duly held and conducted by the Wreck Commissioner of the Dominion of Canada, and that as a result thereof said Wreck Commissioner has determined and found the masters of both the Steamer Mantadoc and the Steamer Yorkton guilty of fault, resulting in said collision, and has suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

That Paterson Steamships Limited has retained Messrs. Meredith, Holden, Heward & Holden, barristers and solicitors of Montreal, as its legal representatives, concerning the various questions arising out of said collision; that as

deponent is advised by Messrs. Meredith, Holden, Heward & Holden, and verily believes, if jurisdiction of the above entitled action be retained by this Court that under all the circumstances of this case this Honorable Court will be unable to do evenhanded justice between the parties in accordance with the Canadian Law, to which all of the parties and vessels involved are subject.

[fol. 93] That an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company, Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and will vacate the writ of foreign attachment and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish and will furnish a valid bond for a like amount in any action in rem which the present libelant may institute in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the libelant may have.

Wherefore deponent prays that an order and decree of this Court be made refusing to take and entertain jurisdiction of the pending action, dismissing the libel and vacating the writ of foreign attachment heretofore served, cancelling the bond given for the release of the Steamer Lachinedoc, remitting the libelant to its remedies in the [fol. 94] Courts of the Dominion of Canada, and for such other and further relief as may be just and proper in the premises.

W. W. Hall.

Subscribed and sworn to before me this 4th day of September, 1930. Ivanhoe Bissonnette, Notary. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant;

against

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF RUFUS CLEMENT HOLDEN, JR.

DOMINION OF CANADA,
Province of Quebec, ss:

Rufus Clement Holden, Jr., being duly sworn, deposes and says that he is a resident of the City of Montreal, Quebec, and that he is a member of the firm of Meredith, [fol. 95] Holden, Heward & Holden, barristers and solicitors, engaged in the general practice of law in the City of Montreal, Quebec, with offices at 215 St. James street, West.

That deponent's said firm has been retained by Paterson Steamship Limited as its local representatives for the handling and disposition of the various questions resulting from the collision between the Steamer Yorkton and the Steamer Mantadoc on Lake Superior on July 9th, 1930. That deponent has had charge of the subject matter and of the various questions relating to said collision and is familiar therewith, and makes this affidavit accordingly.

That this action was brought in the United States District Court for the Western District of New York by the filing of a libel by Henry K. Starnes, doing business as H. K. Starnes & Co., who is alleged to be a resident of the City of Montreal, Canada, and there doing business as H. K. Starnes & Co., that it is alleged in the libel that libelant was the owner of a portion of the cargo of grain being carried on and transported by the Steamer Yorkton at the time of said collision. That it is alleged that said Steamer Yorkton was engaged in the transportation of said cargo of grain, was in collision with the Steamer Mantadoc upon the waters of Lake Superior off Whitefish Point on the evening of July 9, 1930, and that as a result thereof the Steamer Yorkton gradually sunk and was beached in a sinking condition resulting in the alleged total

[fol. 96] loss of libelant's portion of the cargo, for which recovery is sought in this action for the sum of $7,500.00.

That it is alleged therein that the Steamer Mantadoc, which is owned and operated by Paterson Steamships Limited, a corporation of the Dominion of Canada, was at fault for said collision and the resultant damage; that it is further alleged that the portion of said cargo of grain owned by libelant was laden on board the Steamer Yorkton at the Port of Port Arthur, Ontario, for carriage and transportation to and delivery at the Port of Montreal, Quebec.

That as appears by the affidavit of Ermin Burton Sutherland, sworn to the 6th day of September, 1930, and the affidavit of William W. Hall, sworn to the 4th day of September, 1930, annexed hereto and made a part of these motion papers, the Steamer Yorkton is a vessel of Canadian registry, owned and operated by Mathews Steamship Company, Ltd., a Canadian corporation, and the Steamer Mantadoc is likewise a vessel of Canadian registry; that as also appears by said affidavits a bill of lading was issued for the carriage of said libelant's portion of said cargo of grain at Fort William, Ontario; that the contract for the carriage of said cargo was and is subject to, and governed by the laws of the Dominion of Canada, where the said contract was made and where it was to be performed.

That as also appears by said affidavits the licensed officers in charge of both the Steamers Mantadoc and York-[fol. 97] ton were citizens and residents of the Dominion of Canada, and that most, if not all, of the members of the crews of both vessels were likewise citizens and residents of the Dominion of Canada.

That as further appears by said affidavits following said collision an investigation as required by law was duly held by the Wreck Commissioner of the Dominion of Canada, and that as a result thereof said Wreck Commissioner determined and found the masters of both the Steamer Mantadoc and the Steamer Yorkton guilty of fault resulting in the collision, and suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

That as deponent is advised by Messrs. Stanley & Gidley, local counsel for Paterson Steamships Limited in Buffalo, and verily believes, this action was begun by the filing of a

libel in personam on or about the 22nd day of July, 1930; the Steamer Lachinedoc having on the previous day been attached by the Marshal of this Court at the Port of Buffalo upon two writs of foreign attachment issued out of this Court upon the libels of Canada Malting Company, Ltd., and British Empire Grain Company Limited, respectively.

That in an action of this nature pending in the Courts of the Dominion of Canada, the rule of law is that a cargo owner, in case of mutual fault on the part of both vessels can only recover a moiety of his loss from the vessel colliding with the vessel upon which his cargo is being transported. That accordingly if this action was pending in [fol. 98] the Courts of the Dominion of Can[illegible] and both ships were found in fault libelant would be able in no event to recover more than one-half of its damage as against the Steamer Mantadoc, and her owners, Paterson Steamships Limited.

That under Canadian Law the Steamer Yorkton and her owners could limit their liability only to an aggregate amount equivalent to $38.02, for each ton of the said Steamer Yorkton's registered tonnage with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage.

That an action by the owners of the said Steamship Mantadoc, Paterson Steamships Limited, against the owners of the said Steamer Yorkton, Mathews Steamship Company, Limited, for the damages occasioned by the collision in question has been instituted and is pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners.

R. Clement Holden, Jr.

Subscribed and sworn to before me at Montreal, Province of Quebec, Canada, this 4th day of September, 1930. Ivanhoe Bissonnette, Notary. (Notarial Seal.)

[fol. 99] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF GEORGE D. MACDONALD

STATE OF NEW YORK,
County of Erie, ss:

George D. MacDonald, being duly sworn, deposes and says that he is a resident of the City of Buffalo, New York; that he is engaged in the business of water transportation, and that he is local vessel agent for Paterson Steamships Limited at the Port of Buffalo, and was such on the 21st day of July, 1930.

That my duties as such vessel agent generally consist of seeing that vessels of that fleet coming into that Port receive proper dispatch in loading and unloading cargoes in the Port of Buffalo, and also in transmitting orders from the owners to the masters of said ships.

That on the 21st day of July, 1930, sometime after four o'clock in the afternoon, I was advised that the Steamer [fol. 100] Lachinedoc, then lying at the Dakota Elevator loading cargo, had been attached by the United States Marshal for the Western District of New York under process issued out of this Honorable Court. I at once got in touch with Messrs. Stanley & Gidley, attorneys, with offices in the Marine Trust Building, Buffalo, and advised them of such attachment, and informed them that it was desired to procure the release of said vessel from attachment at once, so that she would not be delayed in starting upon her then pending voyage. Mr. Otten of their office advised me that it was then too late in the day to procure any bond or to release the vessel, but that they would proceed promptly to obtain and file bond on the following morning. That in the evening I talked by telephone to William W. Hall, General Manager of Paterson Steamships Limited, who was then at Toronto, and advised him of the seizure

of the Steamer Lachinedoc, and that I had taken the matter up with Messrs. Stanley & Gidley, with a view of procuring her release, and he instructed me to have Messrs. Stanley & Gidley obtain and file bond for the release of the Steamer Lachinedoc. Accordingly on the following morning I telegraphed Paterson Steamships Limited at Fort William, Ontario, that I had so advised Mr. Hall at Toronto, and that I was arranging bond so as to release the vessel promptly.

The bond was obtained about two o'clock on the 22nd day of July, 1930, and the Steamer Lachinedoc was released, and thereupon left the port on the afternoon of that day.

[fol. 101] I neither received nor gave any instructions other than as related above, and I had no authority as local vessel agent to do more than to facilitate the movement of the Steamer Lachinedoc when attached under the process of this Honorable Court.

George D. MacDonald.

Subscribed and sworn to before me this 8th day of September, 1930. Arthur E. Otten, Notary Public in and for Erie County, New York.

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

HENRY K. STARNES, Doing Business as H. K. Starnes & Co., Libelant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF ELLIS H. GIDLEY

STATE OF NEW YORK,
County of Erie, ss:

Ellis H. Gidley, being duly sworn, deposes, and says that he is a resident of the City of Buffalo, New York, and [fol. 102] is an attorney at law and a member of the firm of

Stanley & Gidley, attorneys, with offices at 1042 Marine Trust Building, Buffalo, New York.

That on or about the 21st day of July, 1930, deponent's said firm was directed by Mr. George D. MacDonald to procure the release of the Steamer Lachinedoc from attachment at the Port of Buffalo upon a writ of foreign attachment issued in an action pending in this Court upon the libel of Canada Malting Company, Ltd., and also upon a further writ pending in this Court upon the libel of British Empire Grain Company Limited, and that deponent has had the subject matter in charge and is familiar therewith, and makes this affidavit accordingly.

That following Mr. MacDonald's instructions deponent's said firm telegraphed Paterson Steamships Limited at Fort William, on the morning of July 22nd, 1930, that they had been so instructed, and that bonds were required in a total sum of $60,000.00, to release the Steamer Lachinedoc, and asked that said bonds be arranged through the Canadian Surety Company's representative at Winnipeg. That meanwhile deponent obtained copies of the libel from Messrs. Brown, Ely & Richards, proctors for libelant, and learned that two libels had been filed in this Court, one filed by Canada Malting Company, Ltd., seeking recovery of damage in the sum of $40,000.00, and one filed by British Empire [fol. 103] Grain Company Limited, seeking recovery of damage in the sum of $20,000.00. That thereafter, and about noon of said day, deponent was informed by Messrs. Brown, Ely & Richards that they were filing a third libel for a similar cause of action in favor of Henry K. Starnes, doing business as H. K. Starnes & Company, seeking recovery of the sum of $7,500.00, and that they were desirous of amending the libel filed by British Empire Grain Company so as to seek to recover only $12,500.00 herein.

That about the same time deponent was notified by the Buffalo Manager of the American Surety Company of New York that he had received authority to execute said bonds, and thereupon deponent drafted three separate bonds, one in favor of Canada Malting Company, Ltd., in the sum of $40,000.00, one in favor of British Empire Grain Company Limited for the sum of $12,500.00, and one in favor of Henry K. Starnes, doing business as H. K. Starnes & Co., in the sum of $7,500.00, and procured the execution of the same, and after securing the approval of Messrs. Brown, Ely &

Richards thereto filed the same in this Court together with a notice of appearance in each of said actions. Thereupon the Steamer Lachinedoc was released from attachment and immediately proceeded upon her then pending voyage.

That as appears from the libel herein this action is brought by a resident of the Dominion of Canada, engaged [fol. 104] in business in the City of Montreal, against a corporation of the Dominion of Canada. Recovery is sought herein for the alleged loss of a portion of cargo of grain being carried on the Steamer Yorkton as the result of the sinking of the Steamer Yorkton in the waters of Lake Superior on July 9th, 1930, following a collision between the Steamer Yorkton and the Steamer Mantadoc, owned by the respondent herein.

That the rule of law as applied in the Courts of Admiralty in the United States permits an owner of cargo laden upon one of two vessels involved in a collision to sue either one or both vessels, or the owners thereof, at his election; and, if such cargo owner did not contribute to the disaster, permits his recovery, in either event, of the full amount of his loss notwithstanding that the collision be held to be due to mutual fault. That it results that if this Honorable Court retains jurisdiction of this action and applies the United States rule of damage that Paterson Steamships Limited, if fault be found, would be held liable herein for the full amount of cargo owner's damage, even though it be found that both the Steamer Mantadoc and the Steamer Yorkton were mutually at fault. That if said Paterson Steamships Limited be condemned herein for the full amount of cargo owner's damage, Paterson Steamships Limited probably would not be able to exercise any remedy by way of recoupment against the Steamer Yorkton, and [fol. 105] her owners, for the reason that the Steamer Yorkton, as well as the other vessels owned by Mathews Steamship Company, Ltd., are of Canadian registry, and usually trade between Canadian ports, and that it would be highly improbable that this Honorable Court could secure jurisdiction over the Steamer Yorkton, and her owners, or that said vessel, or her owners, could be effectively brought into this litigation by the exercise of Rule 56 of the Admiralty Rules of the United States. That even if the Steamer Yorkton, or other property of her owners, were found within the jurisdiction of this Honorable Court, and

were effectively brought into this litigation as parties thereto, and a finding of mutual fault thereafter resulted with a decree of divided damage between the Steamer Yorkton and the Steamer Mantadoc, the liability of the Steamer Yorkton, and her owners, for the amount of cargo owner's loss and damage so found could be limited under the statutes of the United States to the value of the res plus the pending freight immediately following the disaster.

That as deponent is informed and believes, following said collision the Steamer Yorkton was abandoned by her owners as a constructive total loss as she lay sunk in the waters of Lake Superior; that said vessel has now been raised and towed to Port Arthur, Ontario, but is seriously damaged, and in her present unrepaired condition is of little or no value; that it follows that the value of said ves-
[fol. 106] sel immediately following the disaster, exclusive of her pending freight, would be little or nothing, and if her value in her salved condition, as now existing at the port of Port Arthur, Ontario, be taken there must be deducted therefrom the expenses of salvage of said vessel and towage from the point of disaster to Port Arthur, Ontario, and that by reason of the application of the limitation of liability statute of the United States to cases of foreign owned vessels the result would be that the Steamer Yorkton and her owners, could escape liability in the United States Court against any recoupment that Paterson Steamships Limited might be entitled to enforce against said vessel and her owners, and that the Steamer Mantadoc, and her owners, would thus be required to pay the full amount of cargo owner's loss and damage, leaving it without an effective remedy in the premises against the Steamer Yorkton, and her owners.

It follows, that Paterson Steamships Limited, if jurisdiction be retained by this Court herein, will not dare to implead the Steamer Yorkton, or her owners, in the pending action, assuming that jurisdiction of said vessel, or her owners, could be secured for the reason that the Steamer Yorkton, and her owners, would thus be enabled to escape the payment of any substantial amount of recoupment decreed against them in favor of Paterson Steamships Limited, as a result of the matters and things set forth in the libel herein, through the exercise of such limitation of liability.

[fol. 107] Accordingly, if jurisdiction be retained herein by this Honorable Court, and Paterson Steamships Limited be condemned in accordance with the rule of damage as applied in the United States Courts said Paterson Steamships Limited will be called upon to pay the full amount of loss and damage sustained by libelant as a result of the matters and things complained of in the libel herein and will be left without an effective remedy against the Steamer Yorkton, and her owners, which may be enforced in the Courts of the United States.

That if jurisdiction be retained by this Honorable Court and the Canadian rule of damage in favor of cargo owner be applied Paterson Steamships Limited by reason of the fact that the officers and members of the crew of the Steamer Yorkton are citizens and residents of the Dominion of Canada will be unable to exercise jurisdiction over them, and to compel such officers and members of the crew of the Steamer Yorkton to testify herein, and that as a result Paterson Steamships Limited will be left without any effectual remedy towards showing fault upon the part of the Steamer Yorkton as the cause of such collision and resultant damage.

That since it appears upon the face of the libel herein and from the affidavits submitted herewith that the libelant is a non-resident, and subject of the Dominion of Canada, and the respondent is a non-resident corporation and subject of [fol. 108] the Dominion of Canada, that the contract of carriage was made by the libelant, a Canadian corporation, with a Canadian owned and registered vessel, under a bill of lading subject to the Canadian statutes; that the contract of carriage was to be performed between two ports in the Dominion of Canada, and no part of the same was to be executed within the United States, and that it is governed by the law of the Dominion of Canada; that the collision took place between two vessels owned by subjects of the Dominion of Canada, and that nearly, if not all, of the witnesses were residents and citizens of the Dominion of Canada, if jurisdiction be retained by this Honorable Court it will result that this Honorable Court will not be able to do even-handed justice to the parties in accordance with the law of the Dominion of Canada. That, by reason of the matters and things hereinbefore set forth, the convenience of the parties will be greatly served by the trial and disposi-

tion of the pending cause in the Courts of the Dominion of Canada, rather than within this jurisdiction.

That as appears by the affidavit of Ermin Burton Sutherland, submitted herewith, that an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the [fol. 109] question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish, and will furnish, a valid bond for a like amount in any action in rem which the present libelant may institute in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the libelant may have.

That when libelant placed its grain on board a Canadian registered vessel for carriage between two Canadian ports under a contract of carriage subject to Canadian Law, it thereby subjected itself to the law of Canada; and the matter of liability or obligation, and the extent thereof, as determined by the law of Canada, should bind libelant in seeking recovery for the amount of its loss or damage, and the right of Paterson Steamships Limited to have such law and obligation enforced should not be denied. It, therefore, follows that this Court in the exercise of its equitable powers and of the discretion vested in it as to the exercise of jurisdiction herein should decline to take or entertain jurisdiction herein, and should remit the parties to the Courts of the Dominion of Canada taking cognizance [fol. 110] of the matters and things hereinbefore set forth.

That this motion is made upon the return day of process issued under the libel herein and prior to the respondent having filed any answer to said libel in this Court.

That attached hereto and made a part hereof by reference is a copy of the report of the Dominion Wreck Commissioner made as a result of investigation held at the City of

Toronto, on July 23rd, 24th and 25th, 1930, into the circumstances attending the collision between the SS. Yorkton and the SS. Mantadoc. That reference is hereby made to such report in full for the purpose of showing to the Court the apparent fault upon the part of the Master of the Steamer Yorkton as well as that upon the part of the Steamer Mantadoc, as a result of which such collision occurred, and that said report is hereby referred to in full and made a part hereof.

That the Rules of the Road for the Great Lakes as promulgated by Order in Council of the 4th February, 1916, and as issued by Department of Marine and Fisheries, Canada, violations of which are stated in said report to have been the cause of said collision, read as follows:

"Rule 19. Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rainstorms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the [fol. 111] fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other."

"Rule 22. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving the danger signal of five or more short and rapid blasts of the whistle; and if both vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway, and, if necessary, stopped and reversed, until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

"Rule 23. Steam vessels are forbidden to use what has become technically known among pilots as 'cross signals'—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in the rules, which for any reason he deems injudicious to comply with, instead of answering it with a cross

signal, shall at once sound the danger signals and observe the rule applying thereto (Rule 22)."

"Rule 30. When two steamers are approaching each [fol. 112] other at right angles or obliquely so as to involve risk of collision, other than when one steamer is overtaking another the Steamer which has the other on her own port side shall hold her course and speed; and the steamer which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steamer, or, if necessary to do so, slacken her speed or stop or reverse. The steamer having the other on her own port bow shall blow one blast of her whistle as a signal of her intention to cross the bow of the other, holding her course and speed, which signal shall be promptly answered by the other steamer by one short blast of her whistle as a signal of her intention to direct her course to starboard so as to cross the stern of the other steamer or otherwise keep clear."

"If from any cause whatever the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steamers shall be stopped, and backed if necessary, until signals for passing with safety are made and understood."

"Rule 32. When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on [fol. 113] her own starboard side shall keep out of the way of the other."

"Rule 34. Where, by any of the rules herein prescribed, one of the two vessels shall keep out of her way, the other shall keep her course and speed."

"Rule 35. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

"Rule 37. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

"Rule 38. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Wherefore deponent prays for an order and decree of this Court granting the relief sought by respondent upon this motion, viz., that the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action; [fol. 114] that the Court dismiss the libel herein, and that the Court will remit the libelant to its remedies in the Courts of the Dominion of Canada; that the Court direct that the bond and stipulation heretofore given and filed herein by Paterson Steamships Limited, with the American Surety Company of New York, as surety, be cancelled and discharged of record, and that the respondent have such other and further relief as may be incidental thereto or proper in the premises.

Ellis H. Gidley.

Sworn to before me this 8th day of September, 1930.
Arthur E. Otten, Notary Public, Erie Co., N. Y.

[fol. 115] In United States District Court, Western District of New York

In Admiralty

Canada Malting Company, Ltd., Libelant,

against

Paterson Steamships, Ltd., Respondent

British Empire Grain Company, Ltd., Libelant,

against

Paterson Steamships, Ltd., Respondent

HENRY K. STARNES & COMPANY, Libelant,

against

PATERSON STEAMSHIPS, LTD., Respondent

ANSWERING AFFIDAVIT OF ANDREW J. McELHINNEY

STATE OF NEW YORK,
County of Erie, ss:

Andrew J. McElhinney, being duly sworn, deposes and says:

That he is an attorney in the office of Messrs. Bigham, Englar, Jones & Houston, associate counsel for the libel- [fol. 116] ants herein, and is familiar with all matters relating to the above causes of action, having made a personal investigation into the facts relating to the accident at the scene of the collision, and having examined documents and papers in connection therewith.

On July 23, 1930 your deponent proceeded to Toronto, Canada where the Dominion Wreck Commissioner's Court was conducting a hearing with respect to the above accident with a view to fixing liability. Your deponent appeared at that hearing on behalf of libelants as owners of cargo on board the Steamship "Yorkton." Lea Hinslea, Esquire, appeared for the Steamship "Yorkton", and Rufus C. Holden, Jr., Esquire, appeared for the Steamship "Mantadoc." The captain, second officer, wheelsman and chief engineer of the "Yorkton" were produced and examined by the court and cross-examined by counsel. The captain, second officer, wheelsman, lookout and chief engineer of the "Mantadoc" were likewise produced and examined both by the court and by opposing counsel. Counsel for both parties appearing in the present suits, as well as counsel for the "Yorkton", appeared and cross-examined fully the various witnesses produced. The hearing continued from July 23rd to July 25th, on which day it was closed with arguments by counsel representing the various interests referred to above. During the course of the testimony, the captain of the "Mantadoc" fixed the point of collision on the United States Army Chart for the eastern end of Lake Superior at a place approximately three and one-half [fol. 117] miles N. N. W. of Whitefish Point, Michigan. On

the United States Army General Chart of Lake Superior, the captain of the "Yorkton" placed the point of collision as about nine and one-half miles N. N. W. of Whitefish Point, Michigan. Both of the charts referred to were marked in evidence and received as exhibits at the Wreck Commissioner's hearing. The points fixed by both captains are well within the territorial waters of the United States as indicated by the international boundary lines shown on both charts, copies of which will be produced on the argument of this motion.

On or about August 6, 1930, your deponent received from the Dominion Wreck Commissioner a copy of the report and judgment of the Wreck Commissioner's Court, holding the captains of both the "Mantadoc" and the "Yorkton" at fault for the collision and suspending their licenses for the rest of the season.

No action was instituted by the Paterson Steamships, Ltd., owner of the "Mantadoc", until after the entire testimony taken by the Wreck Commissioner's Court was heard and the "Mantadoc" counsel had opportunity to cross-examine the officers and crew of the "Yorkton", and no action was instituted by them until several weeks after the report and judgment of the Wreck Commissioner's Court, holding both vessels at fault, had been filed. Your deponent is informed and believes that no such action was instituted [fol. 118] by Paterson Steamships, Ltd., owner of the "Mantadoc", until at least a month after the institution of the present suits in this court. Action was then brought in the Toronto Admiralty Court against the Steamship "Yorkton" to recover for the damage to the "Mantadoc." Your deponent is informed and believes that the actual physical damage suffered by the "Mantadoc" amounts to about $16,000. Your deponent is also informed and believes that the damage to the "Yorkton" is made up of the following items:

Cost of raising the "Yorkton" and towing her to Fort William, Ontario	$25,000
Cost of pumping overboard damaged cargo	6,000
Estimated cost of repairs	45,000
Total	$76,000

This information is based on personal reports received by deponent and personal observation of the "Yorkton" as she lay beached below Whitefish Point.

The fact that suit was instituted by respondent in a Canadian court more than a month after the present actions were instituted and after the Wreck Commissioner's Court had made its findings is now urged by respondent as a reason why this court should refuse to exercise jurisdiction. In view of the fact that the physical damage to the "Mantadoc" amounts to only $16,000 and that the damage to the "Yorkton" amounts to $76,000, [fol. 119] and that by instituting suit in a Canadian court to recover the damage to the "Mantadoc", respondent will subject itself to a cross-suit for damages amounting to $76,000, it is quite obvious that the only purpose in instituting the suit in the Toronto court was that respondent might urge the pendency of such suit as an additional reason why this court should refuse to retain jurisdiction in the present actions.

It has been dependent's experience that actions in admiralty courts of Canada involve great delay. In one instance, after the institution of suit, the action was not reached for trial for several years and, accordingly, the action was finally disposed of by settlement in order to avoid further delay. Your deponent has been informed and believes that if the actions instituted in this court are prosecuted with diligence, they will be reached for trial in the course of three or four months, whereas if the court refuses to retain jurisdiction and remits libelants to the courts in Canada, trial will not be had for a period greatly in excess of that time, and libelants will suffer a serious inconvenience, injustice and loss of time in collecting the amount of their damage where admittedly no fault can be urged against them, and the sole question involved is whether respondent alone or some other party should pay the damage suffered by libelants.

The reason most strongly urged by respondent in support of its contention that this court should not retain [fol. 120] jurisdiction over the pending suits is that respondent, in the event of a holding by the court that both vessels are at fault, will be compelled to pay the entire damage sustained by libelants, amounting to about $60,000, whereas if libelants are compelled to resort to Ca-

nadian courts the amount of their recovery will be only $30,000. An examination of the outcome of the present litigation, in the event that the court should hold both the "Yorkton" and "Mantadoc" at fault, will show, however, that the contention of the respondent is without merit and that it would fare equally as well whether the trial is had in American or Canadian courts. If the present suits are allowed to proceed in the American court and the Steamship "Yorkton" or her owner is brought into the present suits in the manner suggested below, the result would be that the owner of the "Yorkton" would immediately file a cross-libel for the amount of its damage. As stated above, the amount of damage sustained by the "Yorkton" is $76,000. The damage to the "Mantadoc" is $16,000. If a trial is then had and the court finds both vessels at fault, libelants would recover their damages amounting to approximately $60,000 from the "Mantadoc." The owner of that vessel in turn would be entitled to recoup half of this sum, i. e., $30,000, and half the amount of its own damage, i. e., $8,000, or a total of $38,000 against the claim of the "Yorkton." As the damage to the "Yorkton" is $76,000, her owner would be entitled to half of that amount, i. e., $38,000, against the "Mantadoc," thus off-[fol. 121] setting the claim of the "Mantadoc" for a similar sum. In other words, the total loss which the respondent, as owner of the "Mantadoc," would sustain if the actions are tried in this court, would be the amount of damage to the "Mantadoc," $16,000, and the cargo damage paid to libelants, $60,000, making a total of $76,000. As the loss of the "Yorkton" is approximately the same amount, it is obvious that in a half damage decision neither vessel would recover from the other, the loss of both vessels being the same. If, on the other hand, the action is tried in Canada, libelants would recover only half of their damage, i. e., $30,000, from the owner of the "Mantadoc," who would not be able to recoup any part of this amount from the "Yorkton's" claim. Furthermore, on cross-libels between the vessel owners the "Mantadoc" would have to pay to the owner of the "Yorkton" one-half the difference between their damages, or $76,000 less $16,000 divided by two, amounting to $30,000. The final result would be that the owner of the "Mantadoc" would pay $30,000, representing the cargo loss to libelants, $30,000 to the owners

of the "Yorkton," and would itself bear the damage to the "Mantadoc," amounting to $16,000, so that the total amount of its loss in a Canadian court would be $76,000, which is the identical amount of the loss it would sustain in the event that the trial was had in this court. It is clear, therefore, that respondent cannot suffer any financial loss, regardless of which court the cases are tried in.

[fol. 122] As the damage to the "Yorkton" so greatly exceeds that of the "Mantadoc," no recovery could be had by the owners of the "Mantadoc" against the "Yorkton" in either court under a half damage decision, by reason of the figures as given above. Accordingly, the question of whether the value to which the "Yorkton" could limit its liability in an American court would be much less than that to which it could limit its liability in a Canadian court, is of no importance and entitled to no weight in considering the merits of this application.

In these calculations no account has been taken of claims for loss of use on the part of the respective vessel owners as these claims are unliquidated, but it is clear that the claim of the owners of the "Yorkton" will greatly exceed that of the owners of the "Mantadoc," as to this item, as the period of the loss of use of the "Yorkton" greatly exceeds that of the "Mantadoc," consequently the "Mantadoc's" owners cannot hope for a recovery against the "Yorkton" in either court.

It is asserted in the moving affidavits that the "Yorkton" in her present condition is of little or no value and that she will probably not be repaired but abandoned as a total loss. Your deponent, however, is informed and believes that such is not the fact but, on the contrary, that the "Yorkton" will be repaired as her value in such repaired condition will greatly exceed the amount which it [fol. 123] will be necessary to spend in putting her in a sound condition. The affidavit of a competent appraiser is submitted herewith, estimating the value of the "Yorkton" in a sound condition to be about $125,000, so that her value in a repaired condition would exceed the cost of repairs and salvage by about $50,000. It seems unreasonable and improbable that the owner of the "Yorkton," after having made a careful examination of that vessel as she lay beached after the accident, would expend the sum of $31,000 to have her raised and towed to Fort William, Ontario,

only to abandon her as a total loss not worth repairing. Furthermore, I am informed and believe that the "Yorkton" is now actually being repaired by the owners at a cost of $45,000, repairs to take 30 days for completion.

It is contended on behalf of respondent, that this court should refuse to retain jurisdiction, by reason of the fact that respondent will be unable to bring the "Yorkton" or her owner into the present actions. . There is no merit to this contention, however, for it will be observed from affidavits submitted herewith, that vessels owned by the Matthews Steamship Company, owner of the "Yorkton," are continually coming into and leaving the port of Buffalo. Thus, in the period covering the last week of July, the month of August and the first week in September, vessels owned by the Matthews Steamship Company were in the port of Buffalo on July 25th, August 10th, August 23rd, [fol. 124] August 25th, August 27th and September 5th or at intervals, on an average, of about every week. As the Matthews Steamship Company has a fleet of about twenty (20) vessels which operate in the Great Lakes and St. Lawrence River, with Toronto as their home port, it is clear that no difficulty would be experienced by respondent in attaching one of these vessels in the port of Buffalo by writ of foreign attachment, and jurisdiction thereby obtained over the owner of the "Yorkton" in the same fashion in which jurisdiction was obtained over the respondent in the present suits.

Inconvenience to witnesses is also urged as a reason why the court should refuse to retain jurisdiction, on the ground that the witnesses all reside in Canada. The home port of the respondent is given as Fort William, Ontario. An examination of the time tables of the Canadian Pacific Railroad Company shows that Fort William is 813 miles from Toronto, where the action instituted by respondent against the Steamship "Yorkton" is now pending. The time tables of the Canadian Pacific Railroad Company also show that the running time between Fort William and Toronto is twenty-four hours. The time tables of the New York Central Railroad Company show that the distance between Toronto and Buffalo is about 116 miles and that this distance can be covered in three hours and fifteen minutes. If the witnesses on behalf of the "Mantadoc" are transported by rail from Fort William to Toronto a total

distance of 813 miles, in twenty-four hours, the additional [fol. 125] journey from Toronto to Buffalo of slightly over 100 miles, in slightly over three hours, certainly would not constitute a serious inconvenience to such witnesses. Furthermore, the ships of respondent are continually passing through the port of Buffalo, where respondent in fact has a local agent, so that the port of Buffalo would be nearer than the port of Toronto if the witnesses were transported by ship instead of by rail as would be more probable, under the circumstances. It is usual, however, in such cases to take the depositions of most of the witnesses, and if the usual practice in this respect is followed, the depositions of the members of the crew of the "Mantadoc" will undoubtedly be taken at points of convenience to the respondent, so that the question of convenience of witnesses cannot be seriously urged as a reason why this court should refuse to retain jurisdiction.

Andrew J. McElhinney.

Sworn to before me this 22nd day of September, 1930. W. Alexander Eldridge, Notary Public, Erie Co., N. Y.

[fol. 126] In United States District Court, Western District of New York

Canada Malting Company, Libelant,

vs.

Paterson Steamships, Limited, Respondent

Affidavit of Edward N. Smith

State of New York,
County of Erie, ss:

Edward N. Smith, being duly sworn, deposes and says: That he resides in the Village of Snyder, New York, and is engaged in business with an office in the City of Buffalo, New York, as an independent marine surveyor, and that prior to engaging in business as an independent marine surveyor, he had many years experience as a shipbuilder

and repairer, and that he is familiar with lake vessels of all types of construction and is familiar with the values of lake ships.

That deponent knows the Steamer "Yorkton"; that he has seen her a number of times and that within the past year deponent was on board said steamer in the Welland Canal; that in the opinion of deponent, the fair value of the Steamer "Yorkton" in sound condition is about $125,000.00.

[fol. 127] That deponent is informed and believes that as result of the collision on July 10, 1930 between the Steamer "Yorkton" and the Steamer "Mantadoc", no abandonment of the said Steamer "Yorkton" was ever tendered by her owners to her underwriters, and that the damage to said Steamer "Yorkton" was not such as to make the said Steamer "Yorkton" a constructive total loss. Deponent is further informed and believes that the Steamer "Yorkton" was raised from her sunken condition by the Great Lakes Towing Company, and delivered at Port Arthur, for about $25,000.00, plus some additional expense of about $6,000.00 for jettisoning the damaged grain aboard her before taking the steamer into Port Arthur, and said steamer was delivered at Port Arthur about August 18th, 1930, and deponent is informed and believes that the repair of the damage to the Steamer "Yorkton" is now being made at Port Arthur, and that the estimated cost of repairs is about $45,000.00 and that it is estimated that the repairs will be completed in about thirty days from the time they started.

That deponent believes that the value of the Steamer "Yorkton" in sound condition exceeds very considerably the amount of the cost of salvaging said steamer and the expense of and in connection with her repairs arising out of said collision.

Deponent is further informed and believes that repair of the damage to the Steamer "Mantadoc" sustained in [fol. 128] said collision has been made at an expense of about $16,000.00, and that said repairs to the Steamer "Mantadoc" were made between July 16th and July 31st, 1930.

Ed. N. Smith.

Subscribed and sworn to before me this 22 day of September, 1930. W. Alexander Eldridge, Notary Public in and for Erie County, N. Y.

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

CANADA MALTING COMPANY, Libellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF CHARLES SCHULTZ

STATE OF NEW YORK,
County of Erie, ss:

Charles Schultz, being duly sworn, deposes and says:

1. That he resides in the City of Buffalo, New York, and is employed as a Clerk in the office of the Collector of Customs at Buffalo, New York, and that he is the Clerk [fol. 129] who enters and clears vessels arriving and departing from the Port of Buffalo, New York, which are under the law required to enter and clear.

2. That on July 23rd, 1930, the Master of the Steamer "Royalton" made entry of said vessel before deponent, and on July 24th, 1930, the Master of the Steamer "Royalton" cleared said vessel before deponent, and that it appears by the "Inward Foreign Manifest" and U. S. Shipping Board form No. 7801, required to be filed by said master, that said Steamer "Royalton" was at said times owned by Mathews Steamship Company, Limited.

3. That on August 25th, 1930, the master of the Steamer "Mathewston" entered and cleared said vessel before deponent, and that it appears by the "Inward Foreign Manifest" and U. S. Shipping Board form No. 7801, required to be filed by said master, that said Steamer "Mathewston" was at said time owned by Mathews Steamship Company, Limited.

Chas. Schultz.

Subscribed and sworn to before me this 15th day of September, 1930. Harold K. Duchmann, Notary Public, Erie Co. N. Y. (Seal.)

[fol. 130] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

CANADA MALTING COMPANY, Libellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF JAMES W. LANIGAN

STATE OF NEW YORK,
County of Erie, ss:

James W. Lanigan, being duly sworn, deposes and says: That he is employed in the United States Customs Service, stationed at Black Rock; that foreign ships bound to and from the Port of Tonawanda are entered and cleared by the Black Rock office, and that deponent has examined the record of entries and clearances of vessels at Tonawanda, and that according to such records, the Steamer "Southton" entered on July 26, 1930, and cleared on July 31, 1930, and that said Steamer "Southton" entered on August 10, 1930 and cleared on August 14, 1930, and that said Steamer "Southton" entered on August 27, 1930, and cleared on August 31, 1930, and that according to the "Inward Foreign Manifests" filed by the master of said steamer at each time of entry, said steamer was at said times owned by Mathews Steamship Company, Limited.
[fol. 131] That according to said records, the Steamer "Malton" entered the Port of Tonawanda on August 23, 1930 and cleared on August 26th, 1930, and that according to the "Inward Foreign Manifest" filed by the master of said steamer, she was at said time owned by Mathews Steamship Company, Limited.

That according to said records, the Steamer "Fulton" entered the Port of Tonawanda on August 31st, 1930 and cleared on September 5, 1930, and that according to the "Inward Foreign Manifest" filed by the master of said steamer, she was at that time owned by Mathews Steamship Company, Limited.

James W. Lanigan.

Subscribed and sworn to before me this 18th day of September, 1930. Laurence E. Coffey, Notary Public, Erie County, N. Y. (Seal.)

[fol. 132] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

CANADA MALTING COMPANY, LIMITED, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

HENRY K. STARNES, Doing Business as H. K. Starnes & Company, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

Brown, Ely & Richards (Laurence E. Coffey, of Counsel), Buffalo, N. Y., and Bigham, Englar, Jones & Huston (Leonard J. Matteson, and A. J. McElhinney, of Counsel), New York City, for Libellant.

Stanley & Gidley, Buffalo, N. Y., for Respondent.

OPINION OF HAZEL, J.

[fol. 133] On Motion to Dismiss

HAZEL, District Judge:

On the night of July 9th, 1930, the steamers Yorkton and Mantadoc collided in Whitefish Bay, Lake Superior within the territorial waters of the United States. The above entitled actions in personam were brought in this jurisdiction against the owner of the Mantadoc alone, and foreign attachments issued by owners of separate cargoes of grain laden aboard the Yorkton which, in consequence of the collision, sank, and the cargoes totally lost. Both vessels are of Canadian registry. Libellants and respondent are foreign citizens, subjects of the Dominion of Canada. The Yorkton was loaded at Port Arthur, Ont., where the contracts of affreightment were made, and the bills of lading issued for delivery of the cargoes at Montreal, Que. An action by the respondent owner of the Steamer Mantadoc

is pending against the claimants of the Steamer Yorkton in the Admiralty Court of the Dominion of Canada to determine the fault of the collision between the two vessels and their owners. The motion herein seeks to have this court decline further jurisdiction of the pending causes, and for dismissal of the libels.

Concedely whether jurisdiction shall be retained is a matter of discretion, and the exercise of the discretion depends upon the facts and circumstances contained in the affidavits. (See Charter Shipping Co. Ltd. vs. Bowring, [fol. 134] Jones & Tidy, decided by the Supreme Court May 19, 1930.) The moving papers show not only that all the parties, including the colliding vessels and their officers and crews, are citizens and residents of Canada, but also that the Dominion Wreck Commissioner has had the cause of the collision under investigation, and on the evidence before him has reached the conclusion that both vessels were equally at fault for the mishap—both having committed culpable error due to faulty interpretation of the rules of navigation and their negligent application. It is pointed out that under existing United States law, assuming a finding of mutual fault on the part of the navigating vessels, the respondent here would be held liable under Admiralty Rule 56 for the entire amount of the cargo damage without any effective remedy for recoupment of one-half of cargo damages against the Yorkton in this action, and, on recovery of the damages, to enforce contribution, another action would be necessary by the claimants of the Mantadoc against the owner of the Yorkton. (See The New York, 175 U. S. 187; Erie R. R. Co. vs. Erie & Western Transp. Co. 204 U. S. 220); while, on the other hand, the remission of the actions to the Admiralty Court of Canada, where the rule is the same as in England, would not in any event involve liability of respondent for more than a moiety of the cargo damage recoverable from each of the vessels found at fault.

It seems to me that the circumstances are such that this court is warranted in refusing to retain jurisdiction, and [fol. 135] that no injustice will result to libellants by remitting the parties to their home forum. That the rule in this court is more favorable to the cargo owners is insufficient reason for retaining jurisdiction.

Plaintiff in opposition urges that inasmuch as the collision occurred within the territorial water of the United States, jurisdiction should not be declined, citing The Heredia vs. Davis, 12 Fed. (2d) 500, and several other adjudications. But in the Heredia case the action was for personal injuries by a foreign seaman against a foreign ship, the injuries occurring owing to the negligence of the latter in an American port, and the court deemed it necessary to exercise jurisdiction to prevent failure of justice; while in the instant case, as said, no failure of justice would result by refusing jurisdiction and relegating the rights of the parties to the courts of their citizenship. That all the parties in interest are citizens of a foreign country, true enough, standing alone, constitutes no objection to retaining jurisdiction, but I think the reasons assigned in these cases for not doing so are meritorious. The collision of the steamships in Whitefish Bay in American waters does not, in my opinion, demand applying the law of the United States on the principle of lex loci in the determination of liability. (See Charter Shipping Company vs. Bowring, et al., supra, where the cause of action arose in waters at Jacksonville, Florida.) In that case the Supreme Court said:

[fol. 136] "Both the parties being British subjects, and the present litigation, as well as the suit pending abroad, apparently involving the applications of English Law to the fund located there, it was for the District Court to say, as it did, upon a consideration of all the circumstances, whether it should decline 'to take cognizance of the case if justice would be done as well by remitting the parties to the home forum'. See The Maggie Hammond, (9 Wall. 457, 19 L. Ed. 780)." * * *

"It was for the District Judge to consider the facts appearing and the inferences which he might draw from them, and reach his own conclusion as to the convenience of witnesses, as well as the other factors upon which he decided that justice would be best served by leaving the parties to their suit in England."

The case of Royal Mail Steam Packet Co. vs. Companhia De Navegacao Lloyd Brasileiro, 27 Fed. (2d) 1002 is cited

in support of the contention that jurisdiction should be retained, but I think that in that case the circumstances were essentially different. There libelant was a British corporation and respondent a Brazilian corporation. The collision occurred in Belgian waters, and, as I read Judge Inch's opinion, he bases his determination upon the injustice that would ensue to libellant by requiring a determination in the Belgian court because the law of that country had not been revised since the World War "to bring it into line with the [fol. 137] depreciation of the Belgian currency." The result, the learned court said, from the depreciation of the Belgian francs, together with the Belgian law limiting liability to 200 francs per gross ton, and allowing the respondent at fault to limit its liability, would enable unjustly avoiding a large part of the damages. The collision here did not occur on the high seas, as in the last mentioned case, but occurred at a point where the inland waters narrowed to a neck, and where it may be assumed the colliding vessels proceeded in United States waters unintentionally or unavoidably. In Fairgrieve vs. Marine In. Co., 94 Fed. 686, the policy of insurance on the Canadian schooner was issued in this country, and the Court was of opinion that, since the validity of the contract was to be determined by the laws of this country, no rules of comity would be violated by retaining the litigation. The adjudication is believed to support respondent's contention rather than libellant's. All other citations for retaining jurisdiction are readily distinguishable from the facts here.

There is another point that bears upon the exercise of discretion, to wit, the hearing and finding of the Canadian Wreck Commissioner, the pending action in the Canadian court brought by the respondent owner of the Mantadoc against the owner of the Yorkton to determine the liability for the collision as between the vessels and their owners. It would certainly lead to complications to have the Cana- [fol. 138] dian Court of Admiralty determine the liability one way, and this Court another way. Such antagonistic determinations might lead to a multiplicity of actions to determine the rights and liabilities of the parties—something that should be avoided. Other arguments in favor of retaining jurisdiction have been considered but are deemed

insufficient. The motion of respondent is granted, and an order on five day's notice to libellant may be entered.*

Dated October 1st, 1930.

——, U. S. D. J.

[fol. 139] In United States District Court, Western District of New York

Canada Malting Co., Ltd., Libellant,

against

Paterson Steamships, Ltd., Respondent

British Empire Grain Co., Ltd., Libellant,

against

Paterson Steamships, Ltd., Respondent

Henry K. Starnes, Doing Business as H. K. Starnes & Company, Libellant,

against

Paterson Steamships, Ltd., Respondent

Petition for Rehearing

The libellants respectfully petition this Court for rehearing on the application of the respondent to dismiss the libels. The grounds of petitioners' application are as follows:

[fol. 140] 1. The statement in the opinion that "the fact that the collision occurred in American waters does not in my opinion demand applying the law of the United States on the principle of lex loci in the determination of liability" is contrary to the decisions of the United States Supreme Court and the established law both of the United States and England. The Court has, therefore, approached

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*The order shall provide for respondent's appearance in any action brought in Canada by cargo owners and file bond for recovery of damages.

the questions presented by this application from a point of view which is fundamentally wrong.

2. The Court has no discretion or authority to dismiss the libels.

3. The Court has misapprehended the situation with respect to this litigation and has given undue weight to the grounds urged by the respondent for the exercise of discretion against jurisdiction. The remission of the litigants to the Canadian forum will work serious hardship and injustice to the libellants with no corresponding benefit to the respondents.

Respectfully submitted.

By Leonard J. Matteson, Proctor. Brown, Ely & Richards, Bigham, Englar, Jones & Houston, Proctors for Libellants. Laurence E. Coffey, Leonard J. Matteson, A. J. McElhinney, of Counsel.

[fol. 141] In United States District Court, Western District of New York

Canada Malting Company, Limited, Libellant,

against

Paterson Steamships, Limited, Respondent

British Empire Grain Company, Limited, Libellant,

against

Paterson Steamships, Limited, Respondent

Henry K. Starnes, Doing Business as H. K. Starnes & Company, Libellant,

against

Paterson Steamships, Limited, Respondent

Brown, Ely & Richards (Laurene E. Coffey, of Counsel), Buffalo, N. Y., and Bigham, Englar, Jones & Houston, (Leonard J. Matteson and A. J. McElhinney, of Counsel), New York City, for Libellant.

Stanley & Gidley, Buffalo, N. Y., for Respondent.

[fol. 142] On Application for Rehearing

1. The word "concededly" in paragraph two, page one of the opinion heretofore filed, is stricken out in view of the misunderstanding of the court as to the position of proctors for libellants in this respect.

The statement in the opinion: "The collision of the steamships in Whitefish Bay in American waters does not, in my opinion, demand applying the law of the United States on the principle of lex loci in the determination of liability", may also be eliminated. It was unnecessary to the decision of the questions submitted, and doubtless, as claimed, was an erroneous statement of the prevailing rule. Whether the ultimate facts here warrant applying a different rule need not be decided.

It is also true, as said by proctor for respondents, that the liability in general average, as held in Charter Shipping Co. vs. Bowring, et al., was not due to the contract but to participation in a common venture, and adjustment depended upon the law of the port of destination after arrival of the vessel. But the principle of that case, with relation to the discretionary right of the court to retain or refuse jurisdiction in view of the facts and circumstances in the instant case, is not inapplicable. On this motion for rehearing proctors for respondent point out that by treaty relations between Great Britain and the United States the boundary waters of the Great Lakes, meaning thereby the [fol. 143] entire body of water comprising lakes, rivers and waterways, separating the two countries, with respect to navigation have become international waterways and equally free to citizens of Canada and citizens of the United States (see Root-Bryce Treaty of 1909, and President's Proclamation of May 13th, 1910; More's Digest of International Law, Vol. I, page 674).

In view of this treaty, there exists, it seems to me, additional reason for declining jurisdiction and relegating the parties to pursue their remedies and rights in the country of which they are citizens and subjects, in the place where the contract of carriage was made and performed, and, further, where the witnesses reside. But assuming, as does libellant, that the collision occurred in American waters,

the contention is that this court is without power to refuse jurisdiction, since sec. 541 of the Judicial Code confers original jurisdiction in the District Court of all causes of admiralty and maritime jurisdiction.

It was not intended to rule that in such case the court was without jurisdiction, but merely that the circumstances were such as to justify the court in declining jurisdiction. The right to take or refuse jurisdiction for special reasons is recognized in The Belgenland, 114 U. S. 355, wherein instances are mentioned rendering it expedient for the court to take jurisdiction of suits between foreigners in causes [fol. 144] "not arising in the country of the forum * * * not on the ground (the learned court says) that it has not jurisdiction; but that from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not." The phrase "not arising in the country of the forum" does not make it obligatory to retain jurisdiction if substantial reason existed for refusing it. The New Texas, 1926 American Maritime Cases, 1515; Goldman vs. Furness, Witby & Co. Ltd., 101 Fed. 467; The Iquitos, 286 Fed. 384. And see The Maggie Hammond 9 Wall. page 457.

Other points presented for retaining jurisdiction need not be discussed.

The order declining jurisdiction may be entered.

Dated January 2nd, 1931.

John R. Hazel, U. S. D. J.

[fol. 145] In United States District Court, Western District of New York

In Admiralty

Canada Malting Company, Limited, Libelant,

vs.

Paterson Steamships, Limited, Respondent

Final Decree Dismissing Libel of Canada Malting Company, Limited—Jan. 12, 1931

The respondent having filed bond and notice of appearance herein, following attachment of respondent's Str.

Lachinedoc herein, and having further filed exceptions to the libel herein, together with its suggestion that the Court ought not to entertain or exercise further jurisdiction over the above entitled action by reason of the matters and things therein stated, and respondent having made a motion for an order and decree of this Court, decreeing that [fol. 146] the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action, and further that the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Str. Lachinedoc, the property of respondent Paterson Steamships, Limited; and further that the Court remit libelant to its remedies in the Courts of the Dominion of Canada; and further that the Court direct that the bond and stipulation heretofore given and filed herein by respondent Paterson Steamships, Limited, with American Surety Company of New York as surety, for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant, be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation; and further for such other and further relief herein as may be incidental thereto or proper in the premises, and said motion being returnable upon the 15th day of September, 1930, said day being the return day of process issued upon the libel filed herein, and said exceptions and motion having duly come on to be heard upon said 15th day of September, 1930, and having been duly adjourned until the 22nd day of September, 1930, by stipulation made at the request of proctors for libelant, and having thereafter duly come on to be heard upon said 22nd day of September, 1930, and [fol. 147] having been duly argued and submitted by Ellis H. Gidley, Esq., and Ray M. Stanley, Esq., of Counsel for respondent in support thereof, and by Leonard J. Matteson, Esq., of Counsel for libelant in opposition thereto;

And on reading and filing the said exceptions together with the suggestion of the respondent and the notice of said motion, the affidavit of Erwin Burton Sutherland, duly sworn to the 6th day of September, 1930; the affidavit of William W. Hall, duly sworn to the 4th day of September, 1930; the affidavit of Rufus Clement Holden, Jr., duly

sworn to the 4th day of September, 1930; the affidavit of George D. MacDonald, duly sworn to the 8th day of September, 1930; the affidavit of Ellis H. Gidley, duly sworn to the 8th day of September, 1930, with proof of due service thereof upon the proctors for libelant, and upon the libel filed herein and the writ of foreign attachment heretofore issued out of this Court and the return of the Marshal thereto, and the notice of appearance filed by respondent, in support of said exceptions and motion; and on reading and filing the affidavit of Andrew J. McElhinney, duly sworn to the 22nd day of September, 1930, and the affidavit of Edward N. Smith, duly sworn to the 22nd day of September, 1930, and the affidavit of Charles Shultz, duly sworn to the 15th day of September, 1930, and the affidavit of James W. Lanigan, duly sworn to the 18th day of September, 1930, submitted in opposition thereto, and due deliberation having been had thereon, and the Court [fol. 148] having rendered its decision and opinion in writing, dated the 1st day of October, 1930, sustaining said exceptions and granting said motion of respondent;

And a petition for rehearing having been thereupon filed herein by libelant and submitted to the Court and due deliberation having been had thereon, and the Court having filed its further decision and opinion in writing thereon dated January 2nd, 1931, denying said petition for rehearing and directing the entry of an order declining jurisdiction herein as heretofore directed by its said original decision and opinion; and the costs of respondent having been duly taxed at the sum of $433.50; and the court having ordered that libelant pay one-half (½) the amount of such taxed costs:

Now, on motion of Stanley & Gidley, proctors for the respondent, it is

Ordered, adjudged, and decreed that the respondent's exceptions to the libel herein be and they hereby are sustained; and it is further

Ordered, adjudged, and decreed that this United States District Court for the Western District of New York does hereby decline and refuse to take and entertain further jurisdiction of the above entitled action; and it is further

Ordered, adjudged, and decreed that the libel herein be [fol. 149] and the same hereby is dismissed with one-half costs, and the writ of foreign attachment heretofore

granted and served herein at the Port of Buffalo upon Str. Lachinedoc, the property of respondent, on or about the 21st day of July, 1930, be and the same hereby is vacated; and it is further

Ordered, adjudged, and decreed that libelant be and it hereby is remitted to its remedies in the Courts of the Dominion of Canada; and it is further

Ordered, adjudged, and decreed upon the entry of this order and decree, respondent shall appear in any action brought by libelant in the Admiralty Courts of the Dominion of Canada for the recovery of the damages herein sought to be recovered, and that in any such action respondent shall file valid surety company bond in a like amount as herein furnished as security for whatever claim in damages libelant may have; and it is further

Ordered, adjudged and decreed that in the event that libelant shall fail to perfect an appeal from this decree within the period of three months next succeeding the date of entry hereof, then the bond and stipulation heretofore given herein with American Surety Company as surety for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant, be forthwith cancelled and discharged of record upon the ex- [fol. 150] piration of said period of three months; that in the event that libelant shall so perfect an appeal from this decree within said period, then said bond and stipulation shall not be cancelled and discharged of record herein until the expiration of a reasonable time following the rendition of final decision upon such appeal within which libelant may institute such action in the Courts of the Dominion of Canada; whereupon said bond and stipulation may be cancelled of record upon application to this Court upon two days' notice.

Ordered, adjudged, and decreed that the respondent Paterson Steamships Limited, recover of and from libelant Canada Malting Company Limited, and its stipulators, one-half the sum of $433.50, its costs as taxed with interest thereon until paid and that it have judgment and execution therefor; and it is further

Ordered, that unless this decree be satisfied or an appeal be taken therefrom within ten days after service of a copy thereof on the proctors for libelant, execution may issue

against the libelant and its stipulators for costs, their goods, chattels, credits and lands, to enforce satisfaction of this decree.

John R. Hazel, U. S. D. J.

The foregoing is approved as to form.
Bigham, Englar, Jones & Houston, Brown, Ely & Richards, Proctors for Libelant.

[fol. 151] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libelant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent

FINAL DECREE DISMISSING LIBEL OF BRITISH EMPIRE GRAIN COMPANY, LIMITED—Jan. 12, 1931

The respondent having filed bond and notice of appearance herein following attachment of respondent's Str. Lachinedoc herein, and having further filed exceptions to the libel herein, together with its suggestion that the Court ought not to entertain or exercise further jurisdiction over the above entitled action by reason of the matters and things therein stated, and respondent having made a motion for an order and decree of this Court, decreeing that [fol. 152] the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action, and further that the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Str. Lachinedoc, the property of respondent Paterson Steamships, Limited; and further that the Court remit libelant to its remedies in the Courts of the Dominion of Canada; and further that the Court direct that the bond and stipulation heretofore given and filed herein by respondent Paterson Steamships Limited, with American Surety Company of New York as surety, for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant,

be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation; and further for such other and further relief herein as may be incidental thereto or proper in the premises, and said motion being returnable upon the 15th day of September, 1930, said day being the return day of process issued upon the libel filed herein, and said exceptions and motion having duly come on to be heard upon said 15th day of September, 1930, and having been duly adjourned until the 22nd day of September, 1930, by stipulation made at the request of proctors for libelant, and having thereafter duly come on to [fol. 153] be heard upon said 22nd day of September, 1930, and having been duly argued and submitted by Ellis H. Gidley, Esq., and Ray M. Stanley, Esq., of counsel for respondent in support thereof, and by Leonard J. Matteson, Esq., of counsel for libelant in opposition thereto;

And on reading and filing the said exceptions together with the suggestion of the respondent and the notice of said motion, the affidavit of Erwin Burton Sutherland, duly sworn to the 6th day of September, 1930; the affidavit of William W. Hall, duly sworn to the 4th day of September, 1930; the affidavit of Rufus Clement Holden, Jr., duly sworn to the 4th day of September, 1930; the affidavit of George D. MacDonald, duly sworn to the 8th day of September, 1930; the affidavit of Ellis H. Gidley, duly sworn to the 8th day of September, 1930, with proof of due service thereof upon the proctors for libelant, and upon the libel filed herein and the writ of foreign attachment heretofore issued out of this Court and the return of the Marshal thereto, and the notice of appearance filed by respondent, in support of said exceptions and motion; and on reading and filing the affidavit of Andrew J. McElhinney, duly sworn to the 22nd day of September, 1930, and the affidavit of Edward N. Smith, duly sworn to the 22nd day of September, 1930, and the affidavit of Charles Shultz, duly sworn to the 15th day of September, 1930, and the affidavit of James W. Lanigan, duly sworn to the 18th day of September, 1930, submitted in opposition thereto, and due deliberation hav- [fol. 154] ing been had thereon, and the Court having rendered its decision and opinion in writing, dated the 1st day of October, 1930, sustaining said exceptions and granting said motion of respondent;

And a petition for rehearing having been thereupon filed herein by libelant and submitted to the Court and due

deliberation having been had thereon, and the Court having filed its further decision and opinion in writing thereon dated January 2nd, 1931, denying said petition for rehearing and directing the entry of an order declining jurisdiction herein as heretofore directed by its said original decision and opinion; and the costs of respondent having been duly taxed at the sum of $158.49, and the Court having ordered that libelant pay one-half (½) the amount of such taxed costs:

Now, on motion of Stanley & Gidley, proctors for the respondent, it is

Ordered, adjudged and decreed that the respondent's exceptions to the libel herein be and they hereby are sustained; and it is further

Ordered, adjudged, and decreed that this United States District Court for the Western District of New York does hereby decline and refuse to take and entertain further jurisdiction of the above entitled action; and it is further [fol. 155] Ordered, adjudged, and decreed that the libel herein be and the same hereby is dismissed with one-half costs, and the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Str. Lachinedoc, the property of respondent, on or about the 21st day of July, 1930, be and the same hereby is vacated; and it is further

Ordered, adjudged, and decreed that libelant be and it hereby is remitted to its remedies in the Courts of the Dominion of Canada; and it is further

Ordered, adjudged, and decreed upon the entry of this order and decree, respondent shall appear in any action brought by libelant in the Admiralty Courts of the Dominion of Canada for the recovery of the damages herein sought to be recovered, and that in any such action respondent shall file valid surety company bond in a like amount as herein furnished as security for whatever claim in damages libelant may have; and it is further

Ordered, adjudged, and decreed that in the event that libelant shall fail to perfect an appeal from this decree within the period of three months next succeeding the date of entry hereof, then the bond and stipulation heretofore given herein with American Surety Company as surety for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore

[fol. 156] issued and served herein upon the prayer of libelant, be forthwith cancelled and discharged of record upon the expiration of said period of three months; that in the event that libelant shall so perfect an appeal from this decree within said period, then said bond and stipulation shall not be cancelled and discharged of record herein until the expiration of a reasonable time following the rendition of final decision upon such appeal within which libelant may institute such action in the Courts of the Dominion of Canada, whereupon said bond and stipulation may be cancelled of record upon application to this Court upon two days' notice.

Ordered, adjudged, and decreed that the respondent Paterson Steamships Limited, recover of and from libelant British Empire Grain Company, Limited, and its stipulators, one-half the sum of $158.49, its costs as taxed with interest thereon until paid and that it have judgment and execution therefor; and it is further

Ordered that unless this decree be satisfied or an appeal be taken therefrom within ten days after service of a copy thereof on the proctors for libelant, execution may issue against the libelant and its stipulators for costs, their goods, chattels, credits and lands, to enforce satisfaction of this decree.

John R. Hazel, U. S. D. J.

The foregoing is approved as to form.
Bigham, Englar, Jones & Houston, Brown, Ely & Richards, Proctors for Libelant.

[fol. 157] In United States District Court, Western District of New York

In Admiralty

Henry K. Starnes, Doing Business as H. K. Starnes & Co., Libelant,

vs.

Paterson Steamships Limited, Respondent.

Final Decree Dismissing Libel of Henry K. Starnes—Jan. 12, 1931

The respondent having filed bond and notice of appearance herein following attachment of respondent's Str.

Lachinedoc herein, and having further filed exceptions to the libel herein, together with its suggestion that the Court ought not to entertain or exercise further jurisdiction over the above entitled action by reason of the matters and things therein stated, and respondent having made a motion for an order and decree of this Court, decreeing that the Court exercise the discretion conferred upon it by [fol. 158] operation of law and refuse to take and entertain further jurisdiction of the above entitled action, and further that the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Str. Lachinedoc, the property of respondent Paterson Steamships Limited; and further that the Court remit libelant to its remedies in the Courts of the Dominion of Canada; and further that the Court direct that the bond and stipulation heretofore given and filed herein by respondent Paterson Steamships Limited, with American Surety Company of New York as surety, for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant, be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation; and further for such other and further relief herein as may be incidental thereto or proper in the premises, and said motion being returnable upon the 15th day of September, 1930, said day being the return day of process issued upon the libel filed herein, and said exceptions and motion having duly come on to be heard upon said 15th day of September, 1930, and having been duly adjourned until the 22nd day of September, 1930, by stipulation made at the request of proctors for libelant, and having thereafter duly come on to be heard upon said 22nd day of September, 1930, and having been duly argued and submitted by Ellis H. Gidley, [fol. 159] Esq., and Ray M. Stanley, Esq., of Counsel for respondent in support thereof, and by Leonard J. Matteson, Esq., of Counsel for libelant in opposition thereto;

And on reading and filing the said exceptions together with the suggestion of the respondent and the notice of said motion, the affidavit of Erwin Burton Sutherland, duly sworn to the 6th day of September, 1930; the affidavit of William W. Hall, duly sworn to the 4th day of September, 1930; the affidavit of Rufus Clement Holden, Jr., duly sworn

to the 4th day of September, 1930; the affidavit of George D. MacDonald, duly sworn to the 8th day of September, 1930; the affidavit of Ellis H. Gidley, duly sworn to the 8th day of September, 1930, with proof of due service thereof upon the proctors for libelant, and upon the libel filed herein and the writ of foreign attachment heretofore issued out of this Court and the return of the Marshal thereto, and the notice of appearance filed by respondent, in support of said exceptions and motion; and on reading and filing the affidavit of Andrew J. McElhinney, duly sworn to the 22nd day of September, 1930, and the affidavit of Edward N. Smith, duly sworn to the 22nd day of September, 1930, and the affidavit of Charles Shultz, duly sworn to the 15th day of September, 1930, and the affidavit of James W. Lanigan, duly sworn to the 18th day of September, 1930, submitted in opposition thereto, and due deliberation having been [fol. 160] had thereon, and the Court having rendered its decision and opinion in writing, dated the 1st day of October, 1930, sustaining said exceptions and granting said motion of respondent;

And a petition for rehearing having been thereupon filed herein by libelant and submitted to the Court and due deliberation having been had thereon, and the Court having filed its further decision and opinion in writing thereon dated January 2nd, 1931, denying said petition for rehearing and directing the entry of an order declining jurisdiction herein as heretofore directed by its said original decision and opinion; and the costs of respondent having been duly taxed at the sum of $106.33, and the Court having ordered that the libelant pay one-half (½) the amount of such taxed costs;

Now, on motion of Stanley & Gidley, proctors for the respondent, it is

Ordered, adjudged and decreed that the respondent's exceptions to the libel herein be and they hereby are sustained; and it is further

Ordered, adjudged and decreed that this United States District Court for the Western District of New York does hereby decline and refuse to take and entertain further jurisdiction of the above entitled action; and it is further

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed with one-half costs, and [fol. 161] the writ of foreign attachment heretofore granted

and served herein at the Port of Buffalo upon the Str. Lachinedoc, the property of respondent, on or about the 21st day of July, 1930, be and the same hereby is vacated; and it is further

Ordered, adjudged and decreed that libelant be and it hereby is remitted to its remedies in the Courts of the Dominion of Canada; and it is further

Ordered, adjudged and decreed upon the entry of this order and decree, respondent shall appear in any action brought by libelant in the Admiralty Courts of the Dominion of Canada for the recovery of the damages herein sought to be recovered, and that in any such action respondent shall file valid surety company bond in a like amount as herein furnished as security for whatever claim in damages libelant may have; and it is further

Ordered, adjudged and decreed that in the event that libelant shall fail to perfect an appeal from this decree within the period of three months next succeeding the date of entry hereof, then the bond and stipulation heretofore given herein with American Surety Company as surety for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant, be forthwith cancelled and discharged of record upon the ex-[fol. 162] piration of said period of three months; that in the event that libelant shall so perfect an appeal from this decree within said period, then said bond and stipulation shall not be cancelled and discharged of record herein until the expiration of a reasonable time following the rendition of final decision upon such appeal within which libelant may institute such action in the Courts of the Dominion of Canada, whereupon said bond and stipulation may be cancelled of record upon application to this Court upon two days' notice.

Ordered, adjudged and decreed that the respondent Paterson Steamships Limited, recover of and from libelant Henry K. Starnes, doing business as H. K. Starnes & Co., and its stipulators, one-half the sum of $106.33 its costs as taxed, with interest thereon until paid and that it have judgment and execution therefor; and it is further

Ordered that unless this decree be satisfied or an appeal be taken therefrom within ten days after service of a copy thereof on the proctors for libelant, execution may issue

against the libelant and its stipulators for costs, their goods, chattels, credits and lands, to enforce satisfaction of this decree.

John R. Hazel, U. S. D. J.

Approved as to form.
Bigham, Englar, Jones & Houston, Brown, Ely & Richards, Proctors for Libelant.

[fol. 163] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

CANADA MALTING COMPANY, LIMITED, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

NOTICE OF APPEAL FROM FINAL DECREE DISMISSING LIBEL OF CANADA MALTING COMPANY, LIMITED

SIRS: Please take notice that the libellant herein, Canada Malting Company, Limited, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered herein on or about the 20th day of January, 1931, and from each and every part of said decree.

Dated New York, March 23, 1931.

Yours, etc., Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, New York; Bigham, Englar, Jones & Houston, 64 Wall Street, New York City (Proctors for Libellant).

[fol. 164] To May C. Sickmon, Clerk of the Court; Messrs. Stanley & Gidley, Proctors for Respondent, Buffalo, New York.

The foregoing appeal is hereby allowed.
March 25, 1931.

(Sgd.) Simon L. Adler, U. S. D. J.

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

BRITISH EMPIRE GRAIN COMPANY, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

NOTICE OF APPEAL FROM FINAL DECREE DISMISSING LIBEL OF BRITISH EMPIRE GRAIN COMPANY, LIMITED

SIRS: Please take notice that the libellant herein, British Empire Grain Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit [fol. 165] from the final decree entered herein on or about the 20th day of January, 1931, and from each and every part of said decree.

Dated New York, March 23, 1931.

Yours, etc., Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, New York; Bigham, Englar, Jones & Houston, 64 Wall Street, New York City (Proctors for Libellant).

To May C. Sickmon, Clerk of the Court; Messrs. Stanley & Gidley, Proctors for Respondent, Buffalo, New York.

The foregoing appeal is hereby allowed.
March 25, 1931.

(Sgd.) Simon L. Adler, U. S. D. J.

[fol. 166] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

HENRY K. STARNES, Doing Business as H. K. Starnes & Company, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

NOTICE OF APPEAL FROM FINAL DECREE DISMISSING LIBEL OF HENRY K. STARNES

SIRS: Please take notice that the libellant herein, Henry K. Starnes, doing business as H. K. Starnes & Company,

hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered herein on or about the 20th day of January, 1931, and from each and every part of said decree.

Dated New York, March 23, 1931.

Yours, etc., Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, New York; Bigham, Englar, Jones & Houston, 64 Wall Street, New York City (Proctors for Libellant).

[fol. 167] To May C. Sickmon, Clerk of the Court; Messrs. Stanley & Gidley, Proctors for Respondent, Buffalo, New York.

The foregoing appeal is hereby allowed.

March 25, 1931.

(Sgd.) Simon L. Adler, U. S. D. J.

In United States District Court, Western District of New York

Canada Malting Company Limited, Libellant,

against

Paterson Steamships, Limited, Respondent

Assignments of Error

The libellant herein, Canada Malting Company, Limited, hereby assigns error in the decisions and decree of the District Court for the Western District of New York in the above entitled action as follows:

1. In that the Court entered a decree in favor of respondent sustaining the exceptions and dismissing the complaint.

[fol. 168] 2. In that the Court held that the question whether jurisdiction should be retained was discretionary.

3. In that the Court failed to hold that since the collision occurred within the territorial waters of the United States, retention of jurisdiction was mandatory.

4. In that the Court held that the fact that another action had been instituted in a Canadian Court of Admiralty by the respondent herein after the institution of the present action and concerning the same cause of action, was a reason for failing to retain jurisdiction.

5. In that the Court held that the pendency of the action brought by the respondent in a Canadian Court of Admiralty might lead to multiplicity of actions and antagonistic determinations and that this was a valid reason for refusing to retain jurisdiction.

6. In that the Court failed to hold that the institution of suit by the respondent in a Canadian Court of Admiralty relating to the same cause of action after the institution of the present suit did not constitute a valid reason for refusing to retain jurisdiction.

7. In that the Court held that the fact that libellant would recover only one-half of its damage in a Canadian [fol. 169] Court of Admiralty in the event of a decision that both vessels were at fault did not constitute sufficient reason for retaining jurisdiction.

8. In that the Court required libellant to show that an injustice would be done if the case were remitted to the Canadian Court instead of requiring respondent to prove that an injustice would be done if jurisdiction was retained by this Court.

9. In that the Court held that the fact that testimony was taken before the Canadian Wreck Commissioner's Court and a decision was reached by that Court holding both vessels at fault constituted a reason for declining jurisdiction.

10. In that the Court held in the event of a decision of both vessels at fault, a recovery in full for libellant's damages would be made against respondent, but respondent would have no effective remedy for recoupment of one-half of this damage from the other colliding vessel or her owner and that another action by respondent would be necessary to enforce contribution.

11. In that the Court failed to hold that in the event of a decision by this Court holding both vessels at fault, respondent could have recoupment and contribution of one-

half of libellant's damages by instituting suit in the Courts of the United States or by filing a petition under the 56th Rule in the present suit against the other colliding vessel or her owner.

[fol. 170] 12. In that the Court held that the fact that by treaty entered into between the United States and Canada the waters in which the collision occurred are open to free navigation by the citizens of both countries, constituted a reason for declining jurisdiction.

13. In that the Court held that the right to take or refuse jurisdiction for special reasons in the present case is recognized in the case of The Belgenland, 114 U. S. 355.

14. In that the Court improperly applied the principle that in cases of collision on the high seas between foreign vessels the retention of jurisdiction is discretionary in the present case of a collision occurring within the territorial waters of the United States.

15. In that even if the case was one in which the retention of jurisdiction was discretionary, the Court abused its discretion in remanding the cases to the Canadian Courts instead of retaining jurisdiction.

16. In that the Court failed to hold that remanding the cases to the Canadian Courts would not result in any advantage to respondent, but would result in a serious disadvantage and injustice to libellant.

17. In that the Court failed to hold that since the collision occurred within the territorial waters of the United [fol. 171] States, the laws of the United States relating to the rights and liabilities of the parties is controlling, and that accordingly the Courts of the United States should interpret and apply these laws.

18. In that the Court failed to hold that the libellant was entitled to choose the forum for its suit.

19. In that the Court failed to find that the two colliding vessels and their owners submitted themselves to the jurisdiction of the Courts of the United States by navigating within the territorial waters of the United States.

20. In that the Court failed to hold that by filing a general appearance respondent waived any right to question the jurisdiction of the Court.

21. In that the Court failed to hold that by remanding the case to the Canadian Court, libellant's rights would be seriously prejudiced because of the greater amount of delay which would be encountered in the Canadian Courts in the hearing and determination of this action.

22. In that the Court failed to hold that even if the question of whether jurisdiction should be retained was discretionary, it was the duty of the respondent to show strong reasons before jurisdiction would be declined.

[fol. 172]. 23. In that the Court failed to hold that respondent did not show that an injustice would be done to respondent if jurisdiction were retained.

24. In that the Court in effect placed the burden on the libellant of showing good cause why jurisdiction should be retained and failed to place the burden on respondent of showing good cause why the Court should refuse to retain jurisdiction.

25. In that the Court failed to overrule the exceptions to the libel.

Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, New York. Bigham, Englar, Jones & Houston, 64 Wall Street, New York, N. Y. (Proctors for Libellant).

[fol. 173] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CANADA MALTING COMPANY, LIMITED, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

HENRY K. STARNES, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

STIPULATION AS TO OMISSIONS FROM THE PRINTED RECORD

It is hereby stipulated by and between the proctors for the appellants and the appellee above named, that from the printed record in the above appeals there may be omitted the following:

First. With respect to the suit brought by British Empire Grain Company, Limited, the suggestion, exceptions [fol. 174] to the libel filed by the respondent-appellee and the supporting affidavits annexed to its notice of motion in said suit, and the affidavits of Andrew J. McElhinney, Edward N. Smith, Charles Schultz and James W. Lanigan filed by libellant-appellant, it being stipulated that said suggestion, exceptions and affidavits are in form identical with those filed in the suit brought by Canada Malting Company, Limited.

Second. With respect to the suit brought by Henry K. Starnes, the copy of the report of the Dominion Wreck Commissioner annexed to affidavit of Ellis H. Gidley, and the affidavits of Andrew J. McElhinney, Edward N. Smith, Charles Schultz and James W. Lanigan, it being stipulated that the copy of said report and of said affidavits are in form identical with those filed in the suit brought by Canada Malting Company, Limited.

Third. That part of the petition for rehearing filed by libellant-appellants commencing near the foot of page two thereof with the words "First Ground", down to the words "respectfully submitted" on the last page of the petition, it being stipulated that the balance of the petition consisting entirely of argument on the law of the case is omitted.

Fourth. The assignments of error filed by British Empire Grain Company, Limited, it being stipulated they are [fol. 175] in form identical with those relating to the decree dismissing the libel of Canada Malting Company, Limited.

Fifth. The assignments of error filed by Henry K. Starnes, it being stipulated they are in form identical with

those relating to the decree dismissing the libel of Canada Malting Company, Limited.

Dated April 2nd, 1931.

Bigham, Englar, Jones & Houston, Brown, Ely & Richards, Proctors for Libellants-Appellants.
Stanley & Gidley, Proctors for Respondent-Appellee.

STIPULATION AS TO RECORD ON APPEAL

It is hereby stipulated by the proctors for the parties, that the foregoing is a true transcript of the record on appeal herein, as agreed upon by the parties.

Dated Buffalo, N. Y., April 18, 1931.

Bigham, Englar, Jones & Houston, Brown, Ely & Richards, Proctors for Libellants-Appellants.
Stanley & Gidley, Proctors for Respondent-Appellee.

[fol. 176] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 177] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CANADA MALTING COMPANY, LTD., Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LTD., Respondent-Appellee

BRITISH EMPIRE GRAIN COMPANY, LTD., Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LTD., Respondent-Appellee

HENRY K. STARNES, Doing Business as H. K. Starnes & Company, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LTD., Respondent-Appellee

Before Manton, Swan and Chase, Circuit Judges

Appeals from the District Court of the United States for the Western District of New York

Separate libels in personam were begun by foreign attachment against Paterson Steamships, Ltd., a Canadian

corporation, by three libellants, two of whom were Canadian corporations, and the third a resident of Canada. On respondent's exceptions, suggestion that the court should decline jurisdiction, and motion to dismiss, a final decree was entered in each suit dismissing the libel. The libellants have appealed. Decrees affirmed.

For opinion below see 49 F. (2d) 802.

[fol. 178] Bigham, Englar, Jones & Houston, Proctors for Appellants. Leonard J. Matteson, Lawrence E. Coffey, Andrew J. McElhinney, of Counsel.

Stanley & Gidley, Proctors for Appellee.

OPINION

SWAN, Circuit Judge:

These cases come before us upon the allegations of the libels, admitted by respondent's exceptions, and upon the facts stated in supporting and opposing affidavits filed on the motion to decline jurisdiction and dismiss the libels. The three suits are alike. Each libellant was an owner of cargo shipped under a Canadian bill of lading for transportation on the steamer Yorkton from one Canadian port to another, and lost in consequence of a collision between the carrying vessel and the respondent's steamer Mantadoc. The collision was alleged to have been caused by faults of the Mantadoc. It occurred in Lake Superior on the American side of the international boundary, and the Yorkton was so badly damaged that she sank, her cargo becoming a total loss. Both vessels were of Canadian registry and each was owned by a Canadian corporation. An investigation conducted at Toronto by the Dominion Wreck Commissioner resulted in a finding that the masters of both vessels were at fault. Immediately after the libels were filed in the court below, the respondent began a suit, which is still pending, in a Canadian admiralty court against the owner of the Yorkton to recover collision damages suffered by the Mantadoc.

Upon the filing of the libels and the seizure under writ of foreign attachment of the respondent's vessel Lachinedoc at the port of Buffalo, the respondent appeared [fol. 179] generally and filed stipulations for release of its vessel. Before the return day it excepted to the libels and

moved for a dismissal of the suits. After hearing upon libels, exceptions and affidavits the motion was granted.

Not only are the libellants and the respondent Canadian subjects but the officers and most, if not all, the members of the crew of each vessel are residents of Canada and so not available for compulsory attendance as witnesses in the district court. This was considered an important consideration by the court below as was also the fact that under our law an innocent cargo owner can recover full damages from the non-carrying vessel, if both the colliding vessels were at fault (The New York, 175 U. S. 187, 208), while under the Canadian law, it is asserted, only half damages would be recoverable from the respondent. The Yorkton has been salvaged and it is contended by libellants that under the rule of The Chattahoochee, 173 U. S. 540, the respondent could implead the owner of the Yorkton and recoup one half of its liability to cargo owners, but there is a dispute whether the salved value of the Yorkton would afford the respondent adequate protection so that the maintenance of the libels here would be no more disadvantage financially than suits by the cargo owners in Canada. The respondent offered, if the libellants were remitted to their home forum, to appear and give adequate security in any suits they might there bring upon their cargo claims, and the decrees below directed the respondent to perform this offer. No one has questioned this feature of the decrees and we say nothing as to it.

The appellants advance two propositions as reasons for [fol. 180] reversal of the decrees of dismissal: first, that the district court had no discretion to decline jurisdiction, and, second, that even if it had, dismissal of the suits was an abuse of discretion.

The argument in support of the first proposition is grounded upon the assertion that since the collision occurred within territorial waters of the United States, the rights and obligations of the parties are to be determined by the law of the place where the tort was committed. Smith v. Condry, 1 How. 28, 32; Slater v. Mexican National R. R. Co., 194 U. S. 120, 126; New York Central v. Chisholm, 268 U. S. 29, 32. It is conceded that in suits between foreigners a court of admiralty may for good cause decline to retain jurisdiction provided the law to be applied is foreign law, but it is contended that when a maritime tort is

governed by the law of the forum, retention of jurisdiction is mandatory.

The most recent statements of the Supreme Court upon the subject do not assert the limitation for which the appellants contend. In Charter Shipping Co. v. Bowring, 281 U. S. 515, 517, it is said:

"The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed unless abused. The Belgenland, 114 U. S. 355, 368; the Maggie Hammond, 9 Wall. 435, 457."

A similarly broad dictum is repeated in Langnes v. Green, 282 U. S. 531, 544, where it is said that although admiralty courts have complete jurisdiction over suits of a maritime nature between foreigners,

"nevertheless the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum."

[fol. 181] But the appellants contend that these statements should not be given so broad a scope as they bear on their face. In the Bowring case foreign law was involved, as the court noticed in a paragraph of its opinion which appears on page 518:

"Both parties being British subjects and the present litigation, as well as the suit pending abroad, apparently involving the application of English law to the fund located there, it was for the District Court to say, as it did, upon a consideration of all the circumstances, whether it should decline 'to take cognizance of the case if justice would be done as well by remittting the parties to the home forum'. See The Maggie Hammond, supra, p. 457."

Similarly, the dictum quoted from Langnes v. Green, supra, is followed by the statement:

"So, while the courts of this country have and may entertain jurisdiction of actions between non-resident foreigners for torts committed in a foreign country, they will exercise such jurisdiction in their discretion and only in special cases."

And it must be admitted that earlier opinions of the Supreme Court left open the question whether discretion to decline jurisdiction would exist if the tort was committed within the United States. In the Belgenland, 114 U. S. 355, at 363, it is said that circumstances often exist which render it inexpedient for the court to take jurisdiction of "controversies between foreigners in cases not arising in the country of the forum"; and again, at page 365, that courts will use a discretion about assuming jurisdiction of "controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong." See also The Maggie Hammond, 9 Wall. 435, 457.

The appellants have cited but one case which has applied the limitation on discretionary jurisdiction for which they contend. In The Apurimac, 7 F. (2d) 741 (E. D. Va.), [fol. 182] Judge Groner seems to have held that jurisdiction was mandatory in a libel for negligent injury to a foreign seaman on a foreign vessel within an American port and so governed by local law. On appeal, however, the decree was affirmed on the ground that jurisdiction was discretionary but discretion was not abused in retaining the suit. Heredia v. Davies, 12 F. (2d) 500 (C. C. A. 4). Whether we should feel at liberty, despite the language used in the recent Supreme Court decisions, to adopt the appellants' contention we need not say. Concededly, the limitation exists only if the law of the forum is the law determining the rights and obligations of the parties.

If the collision had occurred on the high seas, there can be no doubt that the retention of jurisdiction would be a matter of discretion. When two vessels of the same nationality collide upon the high seas the law enforced by the folum will be the law of the flag. The Scotland, 105 U. S. 24, 29; The Eagle Point, 142 F. 453 (C. C. A. 3), cert. denied, 201 U. S. 644. Under the terms of the treaty between Great Britain and the United States (36 Stat. 2448) the waters of the Great Lakes are equally free to citizens of either Canada or the United States and we think collisions in those waters are to be dealt with as though on the high seas. The Eagle, 8 Wall. 15. That was a suit in rem for a collision between American vessels on the Canadian side of the international boundary. It was urged that Canadian law which gave no lien should apply but the court held the

suit should be tried according to the practice and principles of admiralty in this country irrespective of Canadian law. Mr. Justice Nelson, who wrote the opinion, distinguished [fol. 183] a collision on the Great Lakes from a collision within a port. In the latter case there are local rules and usages which should be observed by all who enter the port. He called such cases "exceptional", and applied the admiralty law of the United States to a collision on the Canadian side of the waterway, as would have been done if the collision had been on the high seas. This case was carefully considered in The Avon, Fed. Cas. No. 680 (N. D. Ohio). That was an action in rem by an American ship against a British ship owned and registered in Ontario, for a collision on the Welland Canal, which is within Canadian territory and connects Lakes Erie and Ontario. The contention of the claimant was that the libel must be dismissed because Ontario law governed (being the lex loci delicti) and Ontario law did not give an action in rem. The court held to the contrary, and in speaking of the case of The Eagle, supra, said:

"It occurred in boundary waters, the vessels were all American, exercising an international right in circumstances where, without exception, it has ever been held the local laws were not applicable."

See also, Thompson Towing & Wrecking Ass'n v. McGregor, 207 F. 209, 217 (C. C. A. 6); cf. The Kaiser Wilhelm der Grosse, 175 F. 215 (S. D. N. Y.); The West Cherow, 276 F. 585 (E. D. Va.). Consequently, we think the rights and obligations of the litigants should be determined as though the collision had occurred on the high seas, that is, by the law of their common flag.

If, as we hold, the court had discretion whether or not to entertain jurisdiction, we cannot find any abuse of it in remitting the parties to their home forum. See The New Texas, 1926 A. M. C. 1514 (E. D. N. Y.); Goldman v. Furness Withy & Co., 101 F. 467 (S. D. N. Y.); The Iquitos, [fols. 184 & 185] 286 F. 383 (W. D. Wash.); Charter Shipping Co. v. Bowring, supra.

Accordingly the decrees are affirmed.

[fol. 186] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

CANADA MALTING COMPANY, LTD., Libellant-Appellant,

v.

PATERSON STEAMSHIPS, LTD., Respondent-Appellee

DECREE—Filed July 28, 1931

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 187] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

BRITISH EMPIRE GRAIN COMPANY, LTD., Libellant-Appellant,

v.

PATERSON STEAMSHIPS, LTD., Respondent-Appellee

DECREE—Filed July 28, 1931

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 188] [File endorsement omitted.]

[fol. 189] In United States Circuit Court of Appeals, Second Circuit

Henry K. Starnes, Libellant-Appellant,

v.

Paterson Steamships, Ltd., Respondent-Appellee

Decree—Filed July 28, 1931

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 190] [File endorsement omitted.]

[fol. 191] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 192] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1931

No. 487

CANADA MALTING COMPANY, LTD., Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

ORDER ALLOWING CERTIORARI—Filed November 30, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 193] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1931

No. 488

BRITISH EMPIRE GRAIN COMPANY, LTD., Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

ORDER ALLOWING CERTIORARI—Filed November 30, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 194] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1931

No. 489

HENRY K. STARNES, Doing Business as H. K. Starnes & Company, Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

ORDER ALLOWING CERTIORARI—Filed November 30, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 36,301, 36,302, 36,303. U. S. Circuit Court of Appeals, Second Circuit. Term No. 487. Canada Malting Company, Ltd., petitioner, vs. Paterson Steamships, Ltd. Term No. 488. British Empire Grain Company, Ltd., petitioner, vs. Paterson Steamships, Ltd. Term No. 489. Henry K. Starnes, doing business as H. K. Starnes & Company, petitioner, vs. Paterson Steamships, Ltd. Petition for writs of certiorari and exhibit thereto. Filed October 27, 1931. File Nos. 36,301, 36,302, 36,303.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 487

CANADA MALTING COMPANY, LTD.,
Petitioner-Libellant,

—against—

PATERSON STEAMSHIPS, LTD.,
Respondent.

No. 488

BRITISH EMPIRE GRAIN COMPANY, LTD.,
Petitioner-Libellant,

—against—

PATERSON STEAMSHIPS, LTD.,
Respondent.

No. 489

HENRY K. STARNES, doing business as H. K. Starnes & Company,
Petitioner-Libellant,

—against—

PATERSON STEAMSHIPS, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Petitioners, Canada Malting Co., Ltd., British Empire Grain Co., Ltd., Henry K. Starnes, doing business as H. K. Starnes & Company.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
LEONARD J. MATTESON,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

CANADA MALTING COMPANY, LTD.,
Petitioner-Libellant,

—against—

PATERSON STEAMSHIPS, LTD.,
Respondent.

BRITISH EMPIRE GRAIN COMPANY, LTD.,
Petitioner-Libellant,

—against—

PATERSON STEAMSHIPS, LTD.,
Respondent.

HENRY K. STARNES, doing business as H. K. Starnes & Company,
Petitioner-Libellant,

—against—

PATERSON STEAMSHIPS, LTD.,
Respondent.

Petition.

Your petitioners, Canada Malting Company, Ltd., British Empire Grain Company, Ltd. and Henry K. Starnes, doing business as H. K. Starnes & Company, owners of cargo laden on the steamship "Yorkton" pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its orders,

entered July 28, 1931 (R. 182-184), affirming the decrees of the United States District Court for the Western District of New York. The opinion of the Circuit Court of Appeals (R. 177) is not officially reported. The original opinion of the District Court (R. 132) is officially reported at 49 F. (2d) 802. The opinion of the District Court on application for rehearing (R. 141) is officially reported at 49 F. (2d) 804.

Nature of the Case.

These suits were instituted by the petitioners, as owners of cargo laden on the steamship "Yorkton" against Paterson Steamships, Ltd., as owner of the steamship "Mantadoc", to recover damages for total loss of cargo laden on the steamship "Yorkton", as a result of collision with the steamship "Mantadoc" in Lake Superior on the American side of the International boundary on July 9, 1930. The libels allege that the collision occurred by reason of faults on the part of the "Mantadoc" (R. 6, 63, 69). An investigation conducted by the Dominion Wreck Commissioner at Toronto resulted in a finding that the masters of both vessels were at fault (R. 51).

Upon the filing of the libels and the seizure under writ of foreign attachment of the respondent's vessel "Lachinedoc" at the port of Buffalo, the respondent appeared generally and filed stipulations for the release of its vessel. Before the return day it excepted to the libels and moved for a dismissal of the suits. After a hearing upon the libels, exceptions, and affidavits, the motion was granted. On a petition for a rehearing, a further opinion was filed by the District Court affirming its earlier decision. Decrees were entered in the respective suits sustaining the exceptions and dismissing the libels, remitting the libellants to their remedies in the courts of

the Dominion of Canada and directing that respondent appear and file security in any action instituted by the libellants in the admiralty courts of Canada. The libellants appealed and the Circuit Court of Appeals affirmed these decrees.

The grounds of the respondent's exceptions to the libel were in substance that, inasmuch as the libellants and the respondent are Canadian citizens and the damage involved cargo shipped on a Canadian vessel between Canadian ports damaged by reason of collision with a Canadian vessel, the Court should in its discretion decline to take jurisdiction of the case. Special grounds of alleged inconvenience and prejudice were asserted, all of which were disputed by the libellants.

The petitioners-libellants contended that, in view of the fact that the collision occurred within the territorial waters of the United States and the cause of action arose out of the law of this country, the District Court had no discretion to decline jurisdiction. The petitioners also contended that the circumstances of the case were not such as to justify an exercise of discretion on the part of the District Court to decline jurisdiction. Both the lower courts held that the exercise of jurisdiction under the circumstances of this case was discretionary and the Circuit Court of Appeals declined to interfere with the exercise of that discretion by the District Court in dismissing the libels.

The importance of this decision to the libellants is that under the law of the United States an innocent cargo owner can recover full damages from the non-carrying vessel if both the colliding vessels were at fault—

The New York, 175 U. S. 187, 209—

while under the Canadian law only half damages would be recoverable from the respondent (R. 97, 98). It appears from undisputed facts that the respondent, as owner of the "Mantadoc" will not suffer from the application of the law of the United States to this case, for the reason that the damages of the owner of the "Yorkton" greatly exceed the damages of the owners of the "Mantadoc" and of these libellants combined, giving the respondent perfect protection in the way of a set-off against the claim of the owners of the "Yorkton" of half the damages they must pay to the libellants—

The Chatahoochee, 173 U. S. 540.

Consequently the only beneficiary of the decision of the lower courts is the owner of the "Yorkton", jointly at fault for the collision and not a party to these proceedings.

The Questions Presented.

I. *In cases of collision* OCCURRING WITHIN THE TERRITORIAL LIMITS OF THE UNITED STATES, *has the District Court discretion to decline to exercise the admiralty jurisdiction conferred by the Constitution and acts of Congress in a case where the parties are not citizens of the United States?*

II. *Does the treaty between Great Britain and the United States guaranteeing free navigation of the waters of the Great Lakes to the citizens of each country, subject however to the laws and regulations of either country within its territory, abrogate, with respect to collisions between foreign vessels navigating on the Great Lakes*

within the territorial waters of the United States, the rule repeatedly laid down by this Court that in tort cases the rights and liabilities of the parties arise out of and depend upon the laws of the place of the act, and justify the holding of the Circuit Court of Appeals that the rights and obligations of the parties should be determined as though the collision had occurred on the high seas, that is, by the law of their common flag?

The petitioner contends that in cases of collision occurring within the territorial limits of the United States, the admiralty jurisdiction conferred on the District Courts is positive and mandatory, and there is no discretion to decline jurisdiction in such a case even though the parties are not citizens of the United States.

Since the collision occurred within the territorial waters of the United States, the rights of the parties arise out of and depend upon the law of this country—

Smith v. *Condry*, 1 How. 28, 32;
New York Central v. *Chisholm*, 268 U. S. 29, 32;
Western Union Telegraph Co. v. *Brown*, 234 U. S. 542, 547;
Slater v. *Mexican National Railroad Co.*, 194 U. S. 120, 126.

Although a cause of collision is a transitory action and jurisdiction thereof may be entertained wherever jurisdiction of the parties can be obtained (15 C. J. 739, sec. 41), jurisdiction in another state than that where the act complained of occurs rests merely upon comity and may be declined under proper circumstances (15 C. J. 741). *But the one court having positive undeniable*

jurisdiction of the cause is that of the state where the cause of action arose, whose laws have been violated and whose duty it is to afford redress.

Where the state has conferred jurisdiction on its courts to hear and determine a cause arising out of violation of its own laws, such jurisdiction is positive and mandatory—

Second Employers Liability Cases, 223 U. S. 1, 58-9;
Chicot County v. *Sherwood*, 148 U. S. 529, 534;
McClellan v. *Carland*, 217 U. S. 268, 282;
Kline v. *Burke Construction Co.*, 260 U. S. 226, 234;
Hyde et al. v. *Stone*, 20 How. 170, 175;
Raich v. *Truax et al.*, 219 F. 273;
Woren v. *Witherbee*, 240 F. 1013, 1017;
Defiance Water Company v. *City of Defiance*, 100 F. 178.

The decision of the Circuit Court of Appeals is based on the erroneous proposition that, although the collision admittedly occurred in Lake Superior on the American side of the International boundary, "the rights and obligations of the litigants" do not arise out of the law of this country but "should be determined as though the collision had occurred on the high seas, that is, by the law of their common flag" (R. 182). Pursuant to this erroneous view, the Circuit Court of Appeals justified its decision under *The Belgenland*, 114 U. S. 355, where this Court, dealing with a cause of collision arising *on the high seas* between foreigners, said that jurisdiction is discretionary with respect to a "controversy between foreigners *in cases not arising in the country of the forum*" (p. 363) and that the courts will use discretion as to assuming jurisdiction "of controversies between foreigners

in cases arising beyond the territorial jurisdiction of the country to which the courts belong" (p. 365, italics ours).

The Circuit Court of Appeals said:

> "Under the terms of the treaty between Great Britain and the United States (36 Stat. 2448) the waters of the Great Lakes are equally free to citizens of either Canada or the United States, and we think collisions in those waters are to be dealt with as though on the high seas" (R. 181).

The court ignored the essential difference between the situation on the high seas and that existing with respect to the waters of the Great Lakes, jurisdiction over which is divided between the United States and Canada by an agreed boundary, and overlooked completely the fact that while the Treaty grants the right of free navigation to vessels of either nation across the boundary, this right is granted *"subject, however, to any laws and regulations of either country* within its own territory * * *" (36 Stat. 2448).

Upon consideration of the provisions of the Treaty, it is clear that although the Canadian steamers here involved had been given the privilege of navigating within the territorial waters of the United States they were nevertheless subject to the rules of navigation and the laws of the United States while navigating on the American side of the boundary line. The goods of these libellants were injured within our territorial boundaries by acts of the respondent constituting negligence under our laws. These libellants have appealed to our courts for redress. The respondent is before the court by general appearance as well as by attachment of its goods. The court has jurisdiction of the parties and the subject-matter. We submit that it was the duty of the

District Court to retain jurisdiction, proceed with the case, and afford the libellants (foreigners though they be) the measure of redress granted to all by our laws and not to abdicate its jurisdiction in favor of a foreign court.

REASONS FOR ALLOWANCE OF WRIT.

I. The question presented is one of considerable public interest, involving the question as to what law is applicable with respect to collisions occurring on the waters of the Great Lakes and the interpretation of the treaties between the United States and Great Britain with respect to jurisdiction over those waters.

II. The decision of the Circuit Court of Appeals is based on a misapplication of the decisions of this Court in

The Belgenland, 114 U. S. 355;
The Maggie Hammond, 76 U. S. 435;
Charter Shipping Co. v. *Bowring,* 281 U. S. 515; and
Langnes v. *Green,* 282 U. S. 531.

III. The decision of the lower courts denies the protection of our laws to a foreigner whose goods have been injured while within our territorial boundaries by acts of the respondent which constitute negligence under our laws, and is a violation of the duty of our sovereignty under International Law to afford the protection of our laws and the redress afforded by our courts to citizens of other states or their property while within our borders.

IV. The action of the lower courts in this case is the only instance reported in which a court of the United States has declined to entertain jurisdiction and afford redress with respect to a cause of collision occur-

ring either within our territorial limits, or upon the high seas, or elsewhere.

We submit that the decision of the Circuit Court of Appeals is wrong and should be reviewed by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cases numbered on its docket #433, #434, and #435, October Term, 1930, and entitled: "Canada Malting Company, Ltd., Libellant-Appellant, v. Paterson Steamships, Ltd., Respondent-Appellee; British Empire Grain Company, Ltd., Libellant-Appellant, v. Paterson Steamships, Ltd., Respondent-Appellee; and Henry K. Starnes, doing business as H. K. Starnes & Company, Libellant-Appellant, v. Paterson Steamships, Ltd., Respondent-Appellee"; and that said decrees of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court as herein pray[illegible] for; and that your petitioners may have such ot[illegible] and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

CANADA MALTING COMPANY, LTD.,
BRITISH EMPIRE GRAIN COMPANY, LTD.,
HENRY K. STARNES, doing business as H. K. Starnes & Company.

By D. ROGER ENGLAR,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

CANADA MALTING COMPANY, LTD.,
Petitioner-Libellant,

—against—

PATERSON STEAMSHIPS, LTD.,
Respondent.

BRITISH EMPIRE GRAIN COMPANY, LTD.,
Petitioner-Libellant,

—against—

PATERSON STEAMSHIPS, LTD.,
Respondent.

HENRY K. STARNES, doing business as H. K. Starnes & Company,
Petitioner-Libellant,

—against—

PATERSON STEAMSHIPS, LTD.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts are fully stated in the petition. These suits are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Title 28, Chapter 9, Section 347 of the Judicial Code, as amended

by Act of February 13, 1925, 43 Statutes 938, and under Article 3, Section 2 of the Constitution of the United States.

Specifications of Error.

The Circuit Court of Appeals erred in the following respects:

1. In affirming the decision of the District Court sustaining the exceptions to the libels and entering a decree dismissing the libels in the exercise of assumed discretion, although the cause is one of collision occurring within the territorial waters and under the laws of the United States, and although there has been a clear, definite and positive delegation by Congress to the United States District Courts of jurisdiction in such cases.

2. In holding that under the terms of the treaty between Great Britain and the United States collisions occurring in the waters of the Great Lakes are to be dealt with as though on the high seas.

3. In holding that there was discretion in the District Court to decline jurisdiction under the circumstances of this case.

POINT I.

The Circuit Court of Appeals erred in holding that the rights and obligations of litigants with respect to collisions occurring on the waters of the Great Lakes should, under the terms of the treaty between Great Britain and the United States, be determined as though the collision had occurred on the high seas, that is, by the law of their common flag.

In the case of *Slater* v. *Mexican National Railroad Company,* 194 U. S. 120, this Court, speaking of a tort liability, said:

> "But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry,* 1 How. 28, but equally determines its extent" (p. 126).

This is the universal rule.

> *Smith* v. *Condry,* 1 How. 28, 32;
> *New York Central* v. *Chisholm,* 268 U. S. 29, 32;
> *Western Union Telegraph Company* v. *Brown,* 234 U. S. 542;
> *American Banana Company* v. *United Fruit Company,* 213 U. S. 347.

It is true, as pointed out by the Circuit Court of Appeals, that in *The Scotland,* 105 U. S. 24, 29, this Court held that when two vessels of the same nationality collide upon the high seas, the law enforced by our

courts will be the law of their common flag. In that case this Court said:

> "In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or State, they are generally to be determined by the laws of that State. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect" (p. 29).

The basis of the different rule with respect to collisions on the high seas was clearly set forth, as follows:

> "But, if a collision occurs on the high seas, *where the law of no particular State has exclusive force,* but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly." (Italics ours, pp. 29, 30.)

The collision in this case does not fall within the rule of *The Scotland* because it did not occur "on the high seas, where the law of no particular State has exclusive force". Territorial jurisdiction over the waters of the Great Lakes has been fixed and divided between Canada and the United States by a certain boundary line through the Lakes established by the Treaty of Peace of 1783. By the Treaty of 1794 the right of common navigation of the boundary waters was reciprocally stipulated in favor of the citizens and subjects of the

two countries and these rights were extended by the Treaty of 1871. The latest treaty on the subject, setting forth the situation existing at the time of this collision, is the Root-Bryce Treaty of 1909, 36 Stat. 2448, Art. 1, of which provides as follows:

> "Art. 1. The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purpose of commerce to the inhabitants, and to the ships, vessels and boats of both countries equally, *subject, however, to any laws and regulations of either country within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels and boats of both countries.*" (Italics ours.)

Substantially the same right of common navigation of the boundary waters was reciprocally stipulated in favor of the citizens and subjects of the two countries by the treaties of 1794 and 1871.

It is clear from language quoted that while the right of free navigation on either side of the boundary line is granted to vessels of both countries, it is distinctly stipulated, that they shall be subject to all laws and regulations of either country within its own territory applying equally and without discrimination to the vessels of both countries.

The fact that the treaties have merely afforded reciprocal rights of freedom of transit and navigation to the respective nationals on either side of the international boundary on the waters of the Great Lakes and that this did not affect the territorial character of those waters has been uniformly recognized. In an opinion

rendered with respect to fishing rights by Acting Secretary of State Uhl, May 23, 1894, 194 MS. Dom. Let. 118, Moore's Digest of International Law, Vol. I, 672, it was said:

> "The conclusion is reached that the Great Lakes, whose waters separate the United States from the British Dominion of Canada are wholly territorial, and that the territorial jurisdiction of the respective sovereignties extends and is exercisable to the boundary which, by treaty, has been established between them as running through the middle of said lakes. This Government can neither claim nor admit that in the center of these lakes, on either side of the treaty boundary and up to a distance of one marine league from shore, there can be an area of 'high seas' in the determination of such a question as is presented."

The learned Acting Secretary referred to the decision of this Court in *U. S.* v. *Rodgers*, 150 U. S. 249, holding that the Great Lakes are "high seas" within the meaning of the Federal Crimes Act and that our Courts have jurisdiction to punish an offense under that act committed on an American vessel though in Canadian waters and pointed out that "it by no means follows that those waters are 'high seas' as regards territorial rights of the sovereignties which own their shores." The conclusion was reached that each country had full power to legislate with respect to fishing rights in waters on its side of the international boundary. The same situation has been recognized with respect to the right of each country to legislate concerning wrecking privileges. Moore's Digest Int. Law, Vol. I, §142, pp. 684-691.

With respect to the control of the manner, as opposed to the freedom, of navigation, the complete right of

each country to legislate and provide Rules of Navigation controlling the conduct of all vessels while within its territorial waters, irrespective of the treaty provisions hereinbefore referred to, has always been recognized. For this reason in order to avoid confusion with respect to the rules of navigation in cases where it was necessary for vessels to cross and recross the International Boundary, it was finally arranged by diplomatic negotiations between the two countries that each should adopt similar rules of navigation. Moore's Digest Int. Law, Vol. I, §141, pp. 683, 4.

It is clear, therefore, that the navigation of the vessels here involved, though Canadian, was controlled by the provisions of the statutes of the United States prescribing Rules of Navigation, at the time of the collision in American waters. It is equally clear that the nature and extent of the rights arising out of the collision is governed by the Law of the United States.

The Circuit Court of Appeals was, therefore, quite unjustified in applying the rule of *The Scotland,* which is based on the assumption that the collision has occurred "where the law of no particular State has exclusive force". The case falls squarely within the general principle first cited, that "the only source of this obligation is the law of the place of the act" which "determines not merely the existence of the obligation * * * but equally determines its extent." (*Slater* v. *Mexican National Railroad Company, supra.*)

The Circuit Court of Appeals cited the case of *The Eagle,* 75 U. S. 15, as authority for the proposition that collisions occurring on the waters of the Great Lakes are to be dealt with as though on the high seas. That

was an action by the owner of a brig *in rem* against a towing vessel to recover damages for negligent stranding and incidental collision with another vessel in tow, which occurred on the Canadian side of the Detroit River. It was urged that the Canadian law, which gave no lien, should apply. But the court held that the suit should be tried according to the practice and principles of admiralty in this country irrespective of Canadian law. The case is one involving a question of practice and procedure. There is nothing in the reasoning of the court in that case which would justify a variance as to the substantive law applicable with respect to a collision occurring in the territorial waters of one sovereignty or the other from the general rule which has been repeatedly laid down by this Court, that the substantive law applicable to the rights of the parties is "the law of the place of the act" (Cases, *supra*, p. 13). If the decision in *The Eagle* is inconsistent with the decision of this Court in the *Slater* and later cases, it must, of course, be regarded as overruled. The case of the *Avon*, Fed. Cas. 680 (N. D. Ohio), cited by the Circuit Court of Appeals, follows the decision in *The Eagle*. The case of *Thompson Towing & Wrecking Ass'n* v. *McGregor*, 207 Fed. 209, 217 (6 CCA), deals with the doctrine that a vessel abroad is considered constructively part of her home territory "so far as her 'internal management and discipline' are concerned." *The Kaiser Wilhelm der Grosse*, 175 Fed. 215 (S. D. N. Y.) and the *West Cherow*, 276 Fed. 585 (E. D. Va.), deal with collisions occurring on the high seas within a marine league of a foreign coast or in an open roadstead. All of these decisions deal with the remedy to be afforded by our courts in cases where they have taken jurisdiction of a cause of action arising outside our territorial limits. These decisions

do not affect the general principle that in a case pending in our courts the rights and liabilities of the parties with respect to a collision occurring within our territorial waters arise out of our law which determines both their nature and extent.

POINT II.

In cases of collision occurring within the territorial limits of the United States, the admiralty jurisdiction conferred upon the District Courts is positive and mandatory, and there is no discretion to decline jurisdiction in such a case even though the parties are not citizens of the United States.

The jurisdiction of the United States District Court is conferred and defined by Act of Congress. Section 41 of the United States Code provides as follows:

> "Section 41 (Judicial Code, section 24, amended.) *Original Jurisdiction.* The district courts shall have original jurisdiction as follows:
> * * * * * * * *
>
> Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it * * *."

This is a clear and definite and positive delegation by Congress to the United States District Courts of jurisdiction in all admiralty cases to which the jurisdiction of the United States rightly extends. By its terms no discretion is vested in the District Court to decline jurisdiction in such a case regardless of who the parties may be.

As to causes arising under the laws of the United

States the delegation of jurisdiction is of course full and complete. The fact that as to transitory causes arising outside our territorial limits, jurisdiction is exercised as a matter of comity only and within the Court's sound discretion, in no way affects the positive delegation of jurisdiction with respect to causes of admiralty arising within our territorial limits and under our laws.

It is the universal rule that the vesting of jurisdiction in a court by the Legislature creates a duty on the part of the Court to take and exercise the jurisdiction which is granted.

In the Second Employers' Liability cases, this Court said:

> "*The existence of the jurisdiction creates an implication of duty to exercise it,* and that its exercise may be onerous does not militate against that implication * * *.
>
> "We conclude that rights arising under the act in question may be enforced, *as of right,* in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Second Employers' Liability Cases,* 223 U. S. 1, 58-9. (Italics ours.)

In the case of *Cohens* v. *Virginia,* 19 U. S. (6 Wheat.) 264, 403, this Court said:

> "It is most true that this court will not take jurisdiction, if it should not; but *it is equally true that it must take jurisdiction, if it should.* The judiciary cannot, as the Legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because

it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty."

"In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant and we cannot insert one." (Italics ours.)

See also:

Raich v. *Truax et al.*, 219 Fed. 273, 285;
Murman v. *Wabash Railway Co.*, 220 App. Div. N. Y. 218;
Gregonis v. *P. R. Coal & Iron Co.*, 235 N. Y. 152.

This Court has dealt with the identical question in another line of cases involving the conflict of jurisdiction with, or the concurrent jurisdiction of, the State Courts. In the case of *Chicot County* v. *Sherwood*, 148 U. S. 529, 534, this Court said:

"But the Courts of the United States are bound to proceed to judgment and afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam* v. *Broadnox*, 14 Peters 67;

Union Bank v. *Jollys Administrators*, 18 How. 503."

Similar decisions are:

McClellan v. *Carland*, 217 U. S. 268, 282;
Kline v. *Burke Construction Co.*, 260 U. S. 226, 234;
Hyde et al. v. *Stone*, 20 How. 170, 175.

See also:

Woren v. *Witherbee*, 240 Fed. 1013, 1017;
Defiant Water Co. v. *City of Defiance*, 100 Fed. 178.

In conferring on the District Courts jurisdiction of causes in admiralty, Congress placed no limiting provision. Even citizens of the same State in causes involving small amounts may sue each other in the District Court if the cause is one of admiralty. Similarly, Congress forebore to place any restriction on suits by, against or between foreigners and gave to the District Courts full and complete jurisdiction of causes in admiralty, regardless of parties.

Since Congress conferred this broad power, it is the duty of the District Courts to exercise the power granted and afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. These libellants had the right to select this forum in which to have their rights adjudicated, and it was the duty of the District Court to hear their applications and determine the issues involved.

The District Judge in his opinion (R. 133-6, 142)

placed emphasis on the language used by this Court in its recent opinion in the cases of *Charter Shipping Co., Ltd.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515, 517, as follows:

> "The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed unless abused. *The Belgenland*, 114 U. S. 355, 368; *The Maggie Hammond*, 9 Wall. 435, 457."

A similar statement is found in the opinion in *Lagnes* v. *Green*, 282 U. S. 531, 544. The citations appended to the Court's statement, however, show clearly that the Court was merely restating the rule laid down in the case of *The Belgenland*, 114 U. S. 355, which is expressly limited to "controversies between foreigners *in cases not arising in the country of the forum*" (p. 363) or, as stated at another point in the opinion "cases arising *beyond the territorial jurisdiction* of the country to which the Courts belong" (p. 365). *The Belgenland* was a cause of collision occurring on the high seas. *The Maggie Hammond*, 9 Wall. 435, 457, was a similar decision with respect to a cause of action for breach of contract for a shipment of goods between foreign ports, the contract being made in Scotland and breached abroad. *The Charter Shipping Company* case was a suit for the recovery of general average deposits asserted to have been illegally exacted from the libellant in London. Although the voyage originated in the United States, there was no question but that British law was applicable and this Court pointed out that the suit involved "the application of English law to the fund located there" holding that in such a cause retention of jurisdiction in a suit in admiralty between foreigners was within the discretion of

the Court. Obviously, the case called for no extension of the principles enunciated in *The Belgenland,* and we do not believe that any was intended. In the case of *Lagnes* v. *Green,* the Court was merely citing an analogous principle and the point was not involved. It is even more clear in that case that no extension of the principle of *The Belgenland* was intended. The Circuit Court of Appeals was clearly influenced by this, we believe erroneous, view of the effect of the passages referred to in this Court's opinions in the *Charter Shipping* and *Lagnes* cases (R. 179, 180) but forbore to rest its decision on this ground.

There is in fact no basis for suggesting that jurisdiction should be discretionary with respect to a collision occurring within the territorial limits of this country. The act is wrongful and gives rise to a cause of action only because of the laws of this country. The cause of action arises out of the law of this country and as a result of a breach of its laws. Our courts have criminal as well as civil jurisdiction of offenses at the point at which the collision occurred. The violations of law which contributed to this collision are a breach of our peace and of the security which our laws guarantee to the strangers within our gates, as well as to our own citizens. In Brown on Jurisdiction, Second Edition, page 22, the author says:

> "All judicial power flows from the state, and the grant of legislative power ceases at the line of the state. Judicial power must cease also at that point; *but within the state the power is complete, not only over its citizens, but over the citizens of other states, or of foreigners within its borders, even when passing through the state, the*

laws necessarily protecting its own citizens against the stranger's wrongful acts, and him also while within its borders. It will also give redress for any grievance he has received while passing through, either from citizens or aliens, and enforce any other right he may have, giving him the same relief he would be entitled to were he a citizen. While, therefore, the laws of the state act with equality toward all, throwing open the doors of the courts for the protection of the stranger and citizen alike, it justly requires that the protected party should respect the laws of the country that he or they have chosen to pass through or sojourn in. (Story on Conflict of Laws, sec. 541.) *The general rule of law is, both in England and the United States, that all aliens can bring suits against citizens, or even against other aliens, in all cases where the cause of action arises in the United States;* or, if it be a transitory action, arising anywhere. *Peabody* v. *Hamilton,* 106 Mass. 220.) The laws of the state even concede to the stranger the rights of citizens. One non-resident may sue another non-resident of the state, even upon a cause of action transient in its nature" (pp. 22-23, italics ours).

In Story on Conflict of Laws, 8th Ed., page 754, the following statement appears:

"Vattel lays down the true doctrine in clear terms. 'The sovereignty,' says he, 'united to domain, establishes the jurisdiction of the nation in its territories, or the country which belongs to it. It is its province or that of its sovereign, to exercise justice in all places under its jurisdiction, to take cognizance of errors committed, and the differences that may arise in the country.'"

As this collision occurred within the territorial waters of the United States and liability if any for collision must arise out of the law of the United States, these cases fall clearly within the class of cases of admiralty and maritime jurisdiction, as to which it is the duty of our sovereignty to take cognizance and afford redress. Jurisdiction of cases of this class has been committed by Congress to the District Courts of the United States. It was, therefore, the duty of the District Court to exercise its jurisdiction and afford these libellants the redress to which they are entitled under our laws. Any other conclusion would deny to the stranger within our gates the protection of our laws.

Conclusion.

The Circuit Court of Appeals has erroneously decided that our Courts must regard a cause of collision between Canadian vessels occurring on the Great Lakes within our territorial waters as a cause not arising under our laws, and that the Canadian owner of cargo thereby damaged has no right to appeal to our Courts for redress, although the owner of the offending vessel is present both by attachment of his property and by general appearance. The District Court has declined to exercise jurisdiction with respect to a cause of admiralty arising within the territorial waters of the United States and under its laws, and has abdicated its jurisdiction in favor of a foreign tribunal in spite of the positive delegation of jurisdiction in such cases by the Act of Congress. We submit that both decisions are contrary to the principles repeatedly enunciated by the decisions of this Court, that these principles are of great importance and that the

decisions of the lower courts should be reviewed and reversed.

Respectfully submitted,

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Petitioners, Canada Malting Co., Ltd., British Empire Grain Co., Ltd., Henry K. Starnes, doing business as H. K. Starnes & Company.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
LEONARD J. MATTESON,
Of Counsel.

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CHARLES ELM

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 487.

CANADA MALTING COMPANY, LTD.,
Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

No. 488.

BRITISH EMPIRE GRAIN COMPANY, LTD.,
Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

No. 489.

HENRY K. STARNES, doing business as H. K. Starnes & Company,
Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

BRIEF FOR PETITIONERS.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
LEONARD J. MATTESON,
JAMES W. RYAN,
Counsel for Petitioners, Canada Malting Company, Ltd., British Empire Grain Company, Ltd., H. K. Starnes & Company.

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Treaty of May 8, 1871 with Great Britain (17 Statutes at Large 863) 13
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Treaty of January 11, 1909 with Great Britain (36 Statutes at Large 2448) 8, 9, 10, 35

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 487.

CANADA MALTING COMPANY, LTD.,

Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

No. 488.

BRITISH EMPIRE GRAIN COMPANY, LTD.,

Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

No. 489.

HENRY K. STARNES, doing business as H. K. Starnes & Company,

Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

BRIEF FOR PETITIONERS.

Statement.

These cases come before this Court on writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted November 30, 1931 (R. 111-2).

By these writs the petitioners seek to review the decrees of the said court made on July 28, 1931 (R. 109-10), affirming the final decrees of the United States District Court for the Western District of New York, in admiralty, dismissing the libels herein, made on January 12, 1931 (R. 85, 89, 92).

Opinions Below.

The opinion of the District Court (R. 78) is officially reported as *Canada Malting Co.* v. *Paterson Steamships,* 49 F. (2d) 802.

The opinion of the District Court on application for a re-hearing (R. 84) is officially reported as *Canada Malting Co.* v. *Paterson Steamships,* 49 F. (2d) 804.

The opinion of the Circuit Court of Appeals (R. 104) is officially reported as *Canada Malting Co.* v. *Paterson Steamships,* 51 F. (2d) 1007.

Nature of the Proceeding.

These proceedings were instituted by the filing of libels *in personam,* in admiralty, with a clause of foreign attachment (R. 1, 2, 36, 41). Jurisdiction of the respondent under the libels of the Canada Malting Company, Ltd. and the British Empire Grain Company, Ltd. was obtained by seizure of respondent's steamship "Lachinedoc" in the port of Buffalo, and bonds were filed in order to procure her release (R. 1). In the case of Henry K. Starnes, the respondent filed a stipulation in lieu of attachment (R. 1). In each of the cases the respondent filed a general appearance (R. 2, 5, 39, 43).

Respondent's ownership of the "Mantadoc" is admitted (R. 9, 13).

By their libels the petitioners sought to recover for the loss of their cargo, laden on the steamer "Yorkton", through the sinking of that vessel in collision with respondent's steamer "Mantadoc", in Lake Superior, on the American side of the international boundary line, on July 9th, 1930 (R. 2, 36, 41).

Jurisdiction.

The jurisdiction of this Court is based on Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code Tit. 28, Sec. 347), and on Article III, Section 2, Clause 1, of the Constitution of the United States.

Issues Involved.

After filing bonds and appearing generally in the proceedings, the respondent, in each case, filed a motion to dismiss, exceptions and a suggestion that the court decline to entertain jurisdiction of the proceeding (R. 2, 5, 7, 8, 39, 102, 44, 45, 46). These motions, exceptions and suggestions were based upon the facts that the respondent and all of the petitioners were Canadian citizens; that both of the vessels involved were owned and registered in Canada; and that most of the officers and crew of the vessels were residents of Canada. It was also asserted that an action was brought by the respondent (apparently after the beginning of the present proceedings) against the owners of the "Yorkton" in Toronto, Canada (R. 12, 16, 19).

The District Court, in the exercise of a supposed discretion, dismissed the libels; and the Circuit Court of Appeals affirmed its decision (R. 79, 108).

It appears from the concurrent findings of both the lower courts that the collision occurred on the American side of the international boundary line and therefore within the territorial waters of the United States (R. 78, 104).

The libels charge that the navigators of the "Mantadoc"

> "were guilty of faults and negligence, in that they were careless and inattentive to their duties, in that no proper lookout was maintained, in that said steamer was navigated at too great a speed in a fog, in that she did not give proper heed to the signals of the steamer 'Yorkton', in that she did not stop and reverse her engines in time as should have been done, all in violation of the law and pilot rules" (R. 4, 37-8, 42).

These allegations, of course, are admitted by the exceptions, which are the equivalent of a demurrer. Accordingly, for the purposes of this appeal, the fault of the "Mantadoc" must be taken as admitted. Indeed, there appears to be no dispute on this point, as the respondent, in support of its suggestions, put in evidence the report of the Dominion Wreck Commissioner, in which both vessels were held at fault (R. 30, 64-65). This report fully supports the charges of negligence on the part of the navigators of the "Mantadoc", as set forth in the libels.

That the District Court had jurisdiction both of the respondent and of the subject matter of the litigation, is undisputed.

Accordingly, this appeal presents only issues of law, namely, whether the maritime law of the United States applies to the waters of the Great Lakes on the American side of the international boundary; and whether a District Court has discretion to decline to exercise the jurisdiction conferred upon it by the Constitution and laws of the United States, over a maritime tort committed within United States territorial waters.

POINT I.

The Circuit Court of Appeals erred in holding that the rights and obligations of litigants with respect to a collision between two vessels in the waters of the Great Lakes on the American side of the international boundary should be determined by the law of their common flag as though the collision had occurred on the high seas outside the territorial limits of the United States.

That the collision occurred on the American side of the international boundary line is clear. On this point the District Court said:

> "On the night of July 9th, 1930, the steamers 'Yorkton' and 'Mantadoc' collided in Whitefish Bay, Lake Superior within the territorial waters of the United States" (R. 78).

The Circuit Court of Appeals said:

> "The collision was alleged to have been caused by faults of the 'Mantadoc'. It occurred in Lake Superior on the American side of the international boundary, and the 'Yorkton' was so badly damaged that she sank, her cargo becoming a total loss" (R. 104).

Nevertheless, the Circuit Court of Appeals said:

> "If the collision had occurred on the high seas, there can be no doubt that the retention of jurisdiction would be a matter of discretion. When two vessels of the same nationality collide upon the high seas the law enforced by the forum will be the law of the flag. *The Scotland,* 105 U. S. 24, 29; *The Eagle Point,* 142 F. 453 (C. C. A. 3), cert. denied, 201 U. S. 644. Under the terms of the treaty between Great Britain and the United States (36 Stat. 2448) the waters of the Great Lakes are equally free to citizens of either Canada or the United States and we think collisions in those waters are to be dealt with as though on the high seas" (R. 107).

The statement last quoted involves more than an interesting question of international law; it involves a question of national sovereignty. To hold that the laws of the United States do not apply to the waters of the Great Lakes, on the American side of the international boundary, is a surrender, by judicial decision, of national jurisdiction acquired by force of arms. That sovereignty may be displaced is undoubted; but only in the same way in which it can be acquired, *i. e.,* by conquest or by treaty. Accordingly, the decision of the Circuit Court of Appeals can be sustained only on the theory that the United States has surrendered by treaty the exclusive national jurisdiction which it undoubtedly had at one time over all the waters of the Great Lakes on the American side of the international boundary line. Considering that the territory involved is approximately as large as the whole of New England, the importance of the question is obvious; and certainly the United States will not be deemed to have surrendered its national sovereignty over

these vast inland waters, unless its intent to do so has been expressed in the clearest terms. An examination of the treaties involved not only fails to disclose an intent to surrender national jurisdiction over this territory, but shows a clear intent to the contrary.

The present international boundary line between the United States and Canada was fixed pursuant to the Treaty with Great Britain, concluded on April 11th, 1908 and proclaimed on July 1, 1908 (35 Statutes at Large 2003). The preamble of this treaty is as follows (35 Stats. at L. 2003):

> "The United States of America and His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, and Emperor of India, being desirous of providing for the more complete definition and demarcation of the international boundary between the United States and the Dominion of Canada, have for that purpose resolved to conclude a treaty, * * *."

The treaty then goes on to provide for the appointment of commissioners who shall fix the international boundary line by definite monuments and ranges, and who shall mark the same on charts, which shall be certified and signed and filed with their respective Governments. The commissioners actually completed their labors and reported pursuant to the Treaty on August 15, 1913. The location of the international boundary line as fixed by them is shown on the charts published by the War Department, Corps of Engineers. The boundary line in the neighborhood of Whitefish Bay, Michigan, is shown on Lake Superior Coast Chart No. 1 (Catalogue No. 91) issued by the War Department.

The treaty of January 11, 1909, between the United States and Great Britain, 36 Statutes at Large, 2448, provides as follows:

"PRELIMINARY ARTICLE.

For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

ARTICLE I.

The High Contracting parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, *subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.*

It is further agreed that so long as this treaty shall remain in force, *this same right of navigation shall extend to the waters of Lake Michigan* and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line." (Italics ours.)

The treaty then goes on to provide for certain limitations on the diversion or obstruction of the waters involved, and for the creation of an International Joint Commission whose consent shall be required for any obstruction or diversion on one side of the boundary which may interfere with the level or flow of the waters on the other side of the line.

We think it would be difficult for the average American to grasp the thought that Lake Michigan, which is entirely surrounded by United States territory, has the same international status as the high seas. Nevertheless, it is clear from the language above quoted that whatever cession of national sovereignty the treaty involved with respect to the waters of Lake Superior on the American side of the international boundary, applies equally to Lake Michigan.

We shall not pursue this line of discussion further, as we think the language of the treaty is too clear to permit of any possibility of misconstruction. The treaty clearly provides that both of the parties shall have the right to navigate freely throughout the waters of the Great Lakes, on either side of the international boundary line; and provides with equal clearness that vessels of one nation entering the territorial waters of another, are subject to the local laws, which, in this case, undoubtedly include the rule that all vessels must navigate with caution and at moderate speed in fog. The only limitation on the sovereignty of the United States, so far as concerns Canadian vessels, is that it shall not pass any law inconsistent with the free navigation of the waters in question by such vessels; and that it shall not pass any law which does not apply equally to the ships and citizens of both countries. There is not the slightest support in the treaty for the suggestion that the maritime law of the United

States is not effective on the Great Lakes up to the international boundary line. These waters remain a part of the United States and subject to its laws, just as much as New York harbor or the Mississippi River. The provisions of the Treaty of 1909 are, in substance, the same as are found in every treaty of commerce and navigation. They are not essentially different from the terms of Article 14 of the Treaty with Great Britain of November 19th, 1794 (8 Stat. 116), under which the inhabitants of Great Britain and the United States have the reciprocal right of navigating the ports and rivers of the two countries. It would scarcely have been suggested that this treaty interfered with the territorial jurisdiction of the United States, or of the State of New York, over the waters of New York Harbor; and yet such an argument could not be distinguished in principle from the argument which has been accepted in this case.

From the foregoing it follows that any liability for a tort committed in these waters is determined, both as to its existence and its extent, by the maritime law of the United States:

> "In *The Lottawanna,* Mr. Justice Bradley speaking for the court said: 'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction". * * * One thing, however, is unquestionable; the Constitution must have re-

ferred to a system of law coextensive with, and operating uniformly in, the whole country.'" *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215.

In the case of *Slater* v. *Mexican National Railroad Company*, 194 U. S. 120, this Court, speaking of a tort liability, said:

> "But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent" (p. 126).

This is the universal rule.

> *Smith* v. *Condry*, 1 How. 28, 32;
> *New York Central R. R. Co.* v. *Chisholm*, 268 U. S. 29, 32;
> *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542;
> *American Banana Company* v. *United Fruit Company*, 213 U. S. 347.

It is true, as pointed out by the Circuit Court of Appeals, that in *The Scotland*, 105 U. S. 24, 29, this Court held that when two vessels of the same nationality collide upon the high seas, the law enforced by our courts will be the law of their common flag. In that case this Court said:

> "In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or State, they are generally to be determined by the laws

of that State. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect" (p. 29).

The basis of the different rule with respect to collisions on the high seas was clearly set forth, as follows:

> "But, if a collision occurs on the high seas, *where the law of no particular State has exclusive force,* but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly." (Italics ours, pp. 29, 30.)

The collision in this case does not fall within the rule of *The Scotland* because it did not occur "on the high seas, where the law of no particular State has exclusive force". Territorial jurisdiction over the waters of the Great Lakes has been fixed and divided between Canada and the United States by a certain boundary line through the lakes established by a succession of treaties. The first of these was the Treaty of Peace of 1783 (8 Statutes at Large 80); the last was the Treaty of 1908, referred to above.

The fact that the treaties have merely afforded reciprocal rights of freedom of transit and navigation to the respective nationals on either side of the international boundary on the waters of the Great Lakes and that this did not affect the territorial character of those waters has been uniformly recognized. In an opinion rendered with respect to fishing rights by Acting Secre-

tary of State Uhl, May 23, 1894, 194 MS. Dom. Let. 118, Moore's Digest of International Law, Vol. I, 672-3, it was said:

> "The conclusion is reached that the Great Lakes, whose waters separate the United States from the British Dominion of Canada are wholly territorial, and that the territorial jurisdiction of the respective sovereignties extends and is exercisable to the boundary which, by treaty, has been established between them as running through the middle of said lakes. This Government can neither claim nor admit that in the center of these lakes, on either side of the treaty boundary and up to a distance of one marine league from shore, there can be an area of 'high seas' in the determination of such a question as is presented."*

The learned Acting Secretary referred to the decision of this Court in *U. S.* v. *Rodgers*, 150 U. S. 249, holding that the Great Lakes are "high seas" within the meaning of the Federal Crimes Act, and that our courts have jurisdiction to punish an offense under that act committed on an American vessel though in Canadian waters; and pointed out that "it by no means follows that those waters are 'high seas' as regards territorial rights of the sovereignties which own their shores." The conclusion was reached that each country had full power to legislate with respect to fishing rights in waters on its side of the international boundary. The same situation has been recognized with respect to the right of

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* Although this statement was made prior to the Treaty of 1909, similar treaties for reciprocal rights in the navigation of territorial waters had been in force for many years. See for example: Treaty of November 19, 1794, Art. III (8 Stats. at L. 116); Treaty of May 8, 1871, Arts. XXVI, XXVII and XXVIII (17 Stats. at L. 863).

each country to legislate concerning wrecking privileges. Moore's Digest Int. Law, Vol. I, §142, pp. 684-691.

In Hyde on International Law (Volume 1, p. 268) it is stated:

> "the Great Lakes of Ontario, Erie, Huron and Superior, and their water communications constituting the boundary between the United States and Canada are wholly territorial".

Referring to the *Rodgers* case, the author says it is clear that this Court "did not intimate that those waters were not territorial". We think the accuracy of this statement is beyond question. The decision in the *Rodgers* case turned entirely on the interpretation of a federal statute. The power of Congress to enact the statute and of the courts to enforce it did not depend at all on the question whether the vessel involved was on the high seas or was within the territorial waters of Canada. The sole question was whether the Act was, by its terms, applicable to the place where the crime was committed. Speaking of vessels navigating the Detroit River, the Court said (at p. 260):

> "In traversing the river they are constantly passing from the territorial jurisdiction of the one nation to that of the other. All of them, however, *so far as transactions had on board are concerned*, are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong." (Italics ours.)

From the language which immediately follows, it is clear that the foregoing statement was not based upon any peculiarity in the status of the Great Lakes, but

was deemed to apply generally to vessels in foreign waters. This further appears from the citation by the Court, as authority for the statement, of *Wildenhus's Case,* 120 U. S. 1, 12. That case involved the applicability of Belgian law to a crime committed on a Belgian ship in New York harbor, in the territorial waters of New Jersey. The case establishes not only that the statement above quoted was considered generally applicable, but confirms also the limitations of the doctrine; for in *Wildenhus's Case,* at page 12, it was said:

> "And so by comity it came to be generally understood among civilized nations that *all matters of discipline and all things done on board which affected only the vessel or those belonging to her,* and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require." (Italics ours.)

A very interesting discussion of this entire question is contained in an article entitled "How the Great Lakes became 'High Seas' and Their Status Viewed from the Standpoint of International Law", by Harry E. Hunt, which appears in Volume 4 of the American Journal of International Law, at page 285. While we do not concur in all of the author's conclusions, the article contains a helpful review of the authorities, and some very interesting comments. The following passage (p. 311) is worthy of careful consideration:

> "The puzzle is, how the United States can con-

vert the Great Lakes into 'high seas' when only a part of them are within its jurisdiction. We are aware of no Canadian legislation or decision altering the Canadian division of the Great Lakes in conformity to the American view. Clearly the United States has no power in the premises."

The article also directs attention to the fact that the several states bordering on the Great Lakes have territorial jurisdiction over the adjacent waters as far as the international boundary line. The collision in the present case, for example, occurred within what was originally a part of the State of Michigan. *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 436-7. Certainly that State has never surrendered its general jurisdiction over the waters in question. *U. S.* v. *Bevans*, 3 Wheat. 336, 388-9.

The Circuit Court of Appeals was, therefore, quite unjustified in applying the rule of *The Scotland*, which is based on the assumption that the collision has occurred "where the law of no particular State has exclusive force". The case falls squarely within the general principle first cited, that "the only source of this obligation is the law of the place of the act" which "determines not merely the existence of the obligation * * * but equally determines its extent." (*Slater* v. *Mexican National Railroad Company, supra.*)

The Circuit Court of Appeals cited the case of *The Eagle*, 8 Wall. 15, as authority for the proposition that collisions occurring on the waters of the Great Lakes are to be dealt with as though on the high seas. That was an action by the owner of a brig *in rem* against a towing vessel to recover damages for negligent stranding

and incidental collision with another vessel in tow, which occurred on the Canadian side of the Detroit River. It was urged that as the Canadian law afforded no remedy in the nature of a maritime lien on the vessel herself, no such relief could be afforded in the admiralty courts of the United States. Speaking of the trial of the case in the court below, this Court said:

> "It was tried there, as it should have been tried, according to the practice and principles of the courts of admiralty in this country, wholly irrespective of any local law" (p. 22).

This Court certainly did not question the fact that the waters in which the collision happened were subject to Canadian law; and it is clear that the decision would have been the same if the collision had happened in the territorial waters of any other country. Having decided that it had jurisdiction of the case, the Court apparently considered that the question whether the proceeding should be *in rem* or *in personam* was a matter of procedure which was not affected by the local law. In any event, the decision may readily be sustained on the ground which this Court stated a year later in *The Maggie Hammond* (9 Wall. 435, 451), as follows:

> "Maritime liens are of little or no value, in a country where there are no appropriate tribunals for their enforcement, as they must remain dormant and unavailable, but the denial of such jurisdiction to her admiralty courts, by one country, whether it be by legislation or by the prohibitions of her common law courts, cannot have the effect to impair or diminish the jurisdiction in such cases of the admiralty courts of any other country, if they are legally clothed with the power and authority to en-

force such remedies for the breach of a maritime contract."

There may be some difficulty in reconciling the statement above quoted with the recent decisions of this Court as to the nature of the maritime law, notably in the *Western Maid* (*infra*, p. 30). If any such inconsistency exists, however, it can have no bearing on the question now under discussion, *i. e.*, on what theory this Court proceeded in deciding *The Eagle*.

The Circuit Court of Appeals also cites the case of *The Avon*, Fed. Cas. No. 680 (Vol. 2, p. 255), a decision of the Circuit Court for the Northern District of Ohio. That case arose out of a collision in the Welland Canal between the Canadian steamer "Avon" and the American schooner "Medbury". After the "Avon" had been sold in Canada to a Canadian purchaser, for value and without notice of the collision claim, she was libeled in an American port. The proceeding was *in rem* and it appeared that the Canadian law allowed no such proceeding and recognized no maritime lien arising from the collision. The court conceded the exclusive national jurisdiction of Canada over the Welland Canal; and conceded that the Canadian Government, by express statutory enactment, could have negatived any such lien. Nevertheless, it gave judgment for the libellant on the theory that the general maritime law applies on all navigable waters unless expressly altered by the local sovereignty. The decision appears to have proceeded on the same theory set forth in the passage above quoted from *The Maggie Hammond*.

The West Cherow, 276 F. 585 (E. D. Va.) involved a collision between an American steamer and a Dutch steamer in an open roadstead within the territorial

waters of Portugal. It was contended that the Portuguese law afforded no proceeding *in rem* but the court sustained such a proceeding on the ground that although Portuguese law did not afford the same remedy as the American law, it apparently recognized the same right. We quote from the opinion as follows (at p. 589):

> "It may be true, under the laws of Portugal, that a proceeding *in rem* against the *res* is not specifically provided for in its admiralty courts in that country, designated 'courts of commerce', as prevails among maritime nations generally; yet the right to a lien, or rather to reach and hold liable the vessel itself, for maritime torts arising from collision, such as is recognized by the maritime law common to all civilized nations, is apparently acknowledged."

Accordingly this case also involved a mere question of procedure.

The case of *The Kaiser Wilhelm der Grosse*, 175 F. 215, has no bearing on the question here involved. It is apparently cited for a *dictum* by Judge Hough, to the effect that the waters within a marine league of the French coast might be subject to the territorial jurisdiction of France and still be a part of the high seas. This appears to be merely a matter of terminology.

We desire to call attention at this point to certain considerations which apply to all of the above cases. It will be noted that in all of them the court assumed jurisdiction; and in all of them the court applied what it conceived to be the general maritime law to collisions happening outside the territorial waters of the United States. We submit that the action of the courts in those cases in taking jurisdiction of collisions arising outside

their own territorial waters, affords no support for the argument that they should refuse to take jurisdiction of a collision occurring within those waters.

Innumerable cases can be cited where the admiralty courts of the United States have taken jurisdiction of collisions which occurred on the high seas or in foreign territorial waters; but no case can be cited in which they have declined jurisdiction of a collision which occurred in American territorial waters. Indeed, we have been unable to find any case in which the admiralty courts of the United States have declined jurisdiction of a collision which occurred anywhere in the world.

Apparently, the British admiralty courts have followed the same practice, as appears from the following statement in Marsden's Collisions at Sea, 8th Ed. at page 216:

> "Actions for collision are said to be *communis juris*, and the Admiralty Court never refused to entertain an action merely because both ships were foreign, or their owners not British subjects, or because the collision occurred in foreign waters."

POINT II.

In cases of collision occurring within the territorial limits of the United States, the admiralty jurisdiction conferred upon the District Courts is positive and mandatory and there is no discretion to decline jurisdiction in such a case even though the parties are not citizens of the United States.

The admiralty jurisdiction of the United States Courts is conferred by Article III, Section 2, Clause 1 of the

Constitution. The pertinent provisions of that clause are as follows:

> "The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction."

The jurisdiction of the United States District Court is conferred and defined by Act of Congress. Section 24 of the Judicial Code as amended (U. S. Code, Tit. 28, Sec. 41), provides, in part, as follows:

> "*Original Jurisdiction.* The district courts shall have original jurisdiction as follows:
>
> * * * * * * *
>
> Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it * * *."

This is a clear and definite and positive delegation by Congress to the United States District Courts of jurisdiction in all admiralty cases to which the legislative and judicial jurisdiction of the United States rightly extends, namely, all cases arising within its territorial limits. By its terms no discretion is vested in the District Court to decline jurisdiction in such a case regardless of who the parties may be.

As to causes arising under the laws of the United States the delegation of jurisdiction is of course full and complete. The fact that as to causes arising outside our territorial limits, jurisdiction is exercised as a matter of comity only and within the court's sound discretion, in no way affects the positive delegation of jurisdiction with respect to admiralty causes of action arising within our territorial limits and under our laws.

It is the universal rule that the vesting of jurisdiction in a court by the Legislature creates a duty on the

part of the Court to take and exercise the jurisdiction which is granted.

In the Second Employers'. Liability cases, this Court said:

> *"The existence of the jurisdiction creates an implication of duty to exercise it,* and that its exercise may be onerous does not militate against that implication * * *.
>
> "We conclude that rights arising under the act in question may be enforced, *as of right,* in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." Second Employers' Liability Cases, 223 U. S. 1, 58-9. (Italics ours.)

In the case of *Cohens* v. *Virginia,* 19 U. S. (6 Wheat.) 264, 403, this Court said:

> "It is most true, that this court will not take jurisdiction if it should not: but *it is equally true that it must take jurisdiction, if it should.* The judiciary cannot, as the Legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this

tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one." (Italics ours.)

See also:

Raich v. *Truax et al.*, 219 Fed. 273, 285;
Gregonis v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152.

This Court has dealt with the identical question in another line of cases involving the conflict of jurisdiction with, or the concurrent jurisdiction of, the State Courts. In the case of *Chicot County* v. *Sherwood*, 148 U. S. 529, 534, this Court said:

"But the Courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam* v. *Broadnox*, 14 Peters 67; *Union Bank* v. *Jollys Administrators*, 18 How. 503."

Similar decisions are:

McClellan v. *Carland*, 217 U. S. 268, 282;
Kline v. *Burke Construction Co.*, 260 U. S. 226, 234;
Hyde et al. v. *Stone*, 20 How. 170, 175.

This Court applied the same principle in the field of criminal law, in *Ex Parte U. S.* (242 U. S. 27), where it decided that the Federal Courts had no power to suspend sentence. After pointing out that the courts have discre-

tion in exerting their authority, this Court said, (at p. 42):

> "But these concessions afford no ground for the contention as to power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so."

And again, after pointing out that the practice in question arose from humane motives and was continued with the approval of the prosecuting officers, this Court said (pp. 51-2):

> "Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution."

In conferring on the District Courts jurisdiction of causes in admiralty, Congress placed no limiting provision. Even citizens of the same State in causes involving small amounts may sue each other in the District Court if the cause is one of admiralty. Similarly, Congress forebore to place any restriction on suits by, against or between foreigners and gave to the District Courts full and complete jurisdiction of causes in admiralty, regardless of parties.

Since Congress conferred this broad power, it is the duty of the District Courts to exercise the power granted and afford redress to suitors before them in every case to which the legislative jurisdiction extends, namely, to

all cases arising within the territorial limits of the United States and from a breach of United States law. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. These libellants had the right to select this forum in which to have their rights adjudicated, and it was the duty of the District Court to hear their complaints and determine the issues involved.

The District Judge in his opinion (R. 133-6, 142) placed emphasis on the following language used by this Court in its recent opinion in the cases of *Charter Shipping Co., Ltd.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515, 517:

> "The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed unless abused. *The Belgenland*, 114 U. S. 355, 368; *The Maggie Hammond*, 9 Wall. 435, 457."

A similar statement is found in the opinion in *Langnes* v. *Green*, 282 U. S. 531, 544. The citations appended to the Court's statement, however, show clearly that the Court was merely restating the rule laid down in the case of *The Belgenland*, 114 U. S. 355, which is expressly limited to "controversies between foreigners *in cases not arising in the country of the forum*"* (p. 363) or, as stated at another point in the opinion, "cases arising *beyond the territorial jurisdiction* of the country to which the courts belong"* (p. 365). *The Belgenland* was a case of collision occurring on the high seas, between a Norwegian barque and a Belgian steamship. Neverthe-

* Italics ours.

less, the actual decision was that the courts of the United States should retain jurisdiction. The following passage from the opinion (at p. 365) is significant:

> "But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged."

The Maggie Hammond, 9 Wall. 435, 457, was an action for breach of a contract for the carriage of goods between foreign ports. The case is particularly interesting here because the suit was brought by a Canadian against a Canadian vessel for breach of a contract, made in Scotland, for the carriage of goods from that country to Montreal. Nevertheless, the decision of this Court was that jurisdiction should be retained. The remarks of this Court in *The Maggie Hammond*, to the effect that the jurisdiction was not obligatory, clearly related to a case, like the one before it, where the cause of action arose outside the territorial limits of the United States.

The Charter Shipping Company case was a suit for the recovery of general average deposits asserted to have been illegally exacted from the libellant in London. Although the voyage originated in the United States, there was no question but that British law was applicable and this Court pointed out that the suit involved "the application of English law to the fund located there", holding that in such a cause retention of jurisdiction in a suit in ad-

miralty between foreigners was within the discretion of the Court. Obviously, the case called for no extension of the principles enunciated in *The Belgenland,* and we do not believe that any was intended. In the case of *Langnes* v. *Green,* the Court was merely citing an analogous principle and the point was not involved. It is even more clear in that case that no extension of the principle of *The Belgenland* was intended. The Circuit Court of Appeals was clearly influenced by this, we believe erroneous, view of the effect of the passages referred to in this Court's opinions in the *Charter Shipping* and *Langnes* cases (R. 105, 106) but forebore to rest its decision on this ground.

There is in fact no basis for suggesting that jurisdiction should be discretionary with respect to a collision occurring within the territorial limits of this country. The act is wrongful and gives rise to a cause of action only because of the laws of this country. The cause of action arises out of the law of this country and as a result of a breach of its laws. Our courts have criminal as well as civil jurisdiction of offenses at the point at which the collision occurred. The violations of law which contributed to this collision are a breach of our peace and of the security which our laws guarantee to the strangers within our gates, as well as to our own citizens. In Brown on Jurisdiction, Second Edition, page 22, the author says:

> "All judicial power flows from the state, and the grant of legislative power ceases at the line of the state. Judicial power must cease also at that point; *but within the state the power is complete, not only over its citizens, but over the citizens of other states, or of foreigners within its*

borders, even when passing through the state, the laws necessarily protecting its own citizens against the stranger's wrongful acts, and him also while within its borders. It will also give redress for any grievance he has received while passing through, either from citizens or aliens, and enforce any other right he may have, giving him the same relief he would be entitled to were he a citizen. While, therefore, the laws of the state act with equality toward all, throwing open the doors of the courts for the protection of the stranger and citizen alike, it justly requires that the protected party should respect the laws of the country that he or they have chosen to pass through or sojourn in. The laws of the state even concede to the stranger the rights of citizens. One non-resident may sue another non-resident of the state, even upon a cause of action transient in its nature" (pp. 22-23). (Italics ours.)

In connection with the foregoing quotation, the author appended the following footnote:

> "Story on Conflict of Laws, sec. 541. *The general rule of law is, both in England and the United States, that all aliens can bring suits against citizens, or even against other aliens, in all cases where the cause of action arises in the United States;* or, if it be a transitory action, arising anywhere. *Peabody* v. *Hamilton,* 106 Mass. 220." (Italics ours.)

In Story on Conflict of Laws, 8th Ed., page 754, the following statement appears:

> "Vattel lays down the true doctrine in clear terms. 'The sovereignty,' says he, 'united to domain, establishes the jurisdiction of the nation

> in its territories, or the country which belongs to it. It is its province or that of its sovereign, to exercise justice in all places under its jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country.'"

As stated by Honorable Elihu Root, in his opening address as President of the American Society of International Law, in April, 1910:

> "The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization," 4 American Journal of International Law, 521.

The Circuit Court of Appeals thought it unnecessary to decide whether the District Court could have declined jurisdiction in a case where "the law of the forum is the law determining the rights and obligations of the parties". It held that this question did not arise because the present case was not governable by the laws of the United States. This conclusion was apparently based on *The Eagle, supra, The Avon, supra,* and similar cases. At most these cases tend to support the argument that the present case is governed by the general maritime law; but as this Court has pointed out, there is no such thing as general maritime law, excepting as it forms part of the law of some sovereign state. Undoubtedly, the law which prevails on the Great Lakes is the general maritime law, excepting as modified by statute, but each nation has its own conception of the general maritime

law and applies it accordingly. In the present case the law applicable is undoubtedly the general maritime law as understood and administered by the courts of the United States, and as modified by Congress. As said by this Court in *The Western Maid*, 257 U. S. 419, 432:

> "In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been acepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by a foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules."

Within the territorial limits of the United States there can be no law excepting the law of the United States.

As this Court pointed out in *United States* v. *Bevans* (3 Wheat. 336, 388), jurisdiction is "the power of exclusive legislation". In certain cases the United States may choose not to enforce its law, as in the case of foreign sovereigns, their ambassadors and other diplomatic representatives. So too it may refrain from interference in the internal affairs of a privately owned foreign vessel, as in the case of suits for wages by foreign seaman. Where the cause of action arises in American waters and under American law however, it was recently held by the United States District Court for the Eastern District of Virginia, that jurisdiction was mandatory, even in an action by a foreign seaman for injuries sustained on a foreign vessel. *The Apurimac*, 7 F. (2d) 741. The Cir-

cuit Court of Appeals affirmed on the ground that the jurisdiction was discretionary but was properly exercised. *Heredia* v. *Davies*, 12 F. (2d) 500. We submit that the decision of the District Court was sound; but in any event, as this Court pointed out (at p. 364) in *The Belgenland, supra*, "the case of foreign seamen is undoubtedly a special one * * *." See also *Uravic* v. *Jarka Co.*, 282 U. S. 234, at page 240.

Conversely, in matters relating to the internal discipline of the ship, American law, both civil and criminal, is sometimes applied to acts done on board American vessels in foreign waters.

U. S. v. *Rodgers*, 150 U. S. 249;
Thompson Towing & Wrecking Assn. et al. v. *McGregor et al.*, 207 Fed. 209.

The basis for these decisions is very clearly set forth in the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashford of August, 1842, which was quoted by this Court with approval in the *Rodgers* case, *supra*, at pages 264-5. Mr. Webster pointed out that the jurisdiction and laws of a nation accompany her ships into foreign ports "for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof * * *." He conceded, however, that "for any unlawful acts done by her while thus lying in port * * * she * * * must doubtless be answerable to the laws of the place".

We do not dispute the principle as above stated and qualified, but it clearly has no application to the present case. These petitioners were not related contractually or otherwise to the "Mantadoc"; they were entire strangers to her, *their cargo being on another vessel.* Their only remedy is in tort, and under American law.

It is objected that the American law is more favorable to these petitioners than Canadian law. Under the law of the United States the "Mantadoc" is liable for the full amount of the petitioners' damages, while her liability under Canadian law is said to be for only one half of the damages. This may be a good reason for the respondent's desire to escape the jurisdiction of the United States courts, but it is a curious argument to use in urging those courts to abdicate their jurisdiction. Almost invariably one party or the other would gain some advantage if the court should decline jurisdiction.

As stated above, the law governing this collision can only be the law of the United States. Once this point is established, we think it is unnecessary to determine what particular rule of law governs the case. That is a matter which must await a trial on the merits. The only point material here is that the petitioners base their claim on a violation of United States law in United States territory, and seek redress in the United States courts.

In this situation we submit that the jurisdiction of the Court is not affected by the nationality of the parties or by the nationality of the vessels involved. We quote as follows from the opinion of this Court in the case of *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100 at pages 123-4:

> "In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor.
>
> * * * * * * * * *
>
> A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The ju-

> risdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion."

We think it is clear that the discretion mentioned in the above quotation is to be exercised by the Congress or by the treaty-making power, and not by the courts. The situation is quite different where our courts are asked to enforce the laws of a foreign country. They do so only as a matter of comity; and they may, in their discretion, decline to do so. In the enforcement of the laws of their own country, however, the courts have no discretion to give or withhold relief according to considerations of convenience or nationality. Their duty is to administer justice in all cases over which they have jurisdiction. It is not for them to consider whether some other system of law might be more consonant with abstract justice. Furthermore, in the present case, the presumption is that in any suit by these petitioners against the respondent in the Canadian courts, those courts would apply the substantive law of the United States. This would seem to follow necessarily from the decision in the case of *The Eagle Point* (142 Fed. 453, certiorari denied, 201 U. S. 644) which the respondent cites in its brief in opposition to certiorari. In that case the Circuit Court of Appeals for the Third Circuit decided that the question whether one of two colliding vessels is liable to cargo of the other for full or half damages, is a question of right and not of remedy. If

this is a matter of right, it would seem that the Canadian courts must apply the law of the United States, in this case, since they will presumably recognize that Canadian law cannot be given extra-territorial force so as to govern a tort committed in the territory of the United States. Accordingly, it would follow that, just as the United States courts applied British law in the case of *The Eagle Point,* so the Canadian courts would apply the law of the United States in the present case.

The foregoing is not a mere argument of expediency but is based on our understanding of the actual state of the Canadian law. In this connection, we refer the Court to the Canada Shipping Act, Chap. 113 of the Revised Statutes, 1906, Sections 913 and 919. We think it is clear from these sections that the Canadian Parliament does not purport or attempt to exercise jurisdiction on the American side of the international boundary.

The present case, therefore, presents the extraordinary spectacle of the United States Courts declining to enforce their own law, and remitting the petitioners to the courts of another jurisdiction, where the applicable law (*i. e.,* the maritime law of the United States) will only be enforced, if at all, as a matter of comity, and must be proved by expert witnesses from the United States. To say that there is no precedent for such a decision, is to state the situation very mildly. The rule applied in the lower courts would introduce in the United States, by judicial decision, a principle of extra-territoriality, the converse of that which prevails by treaty in China. There foreigners are not bound to have their rights determined by the local courts; here they are not entitled to do so. Such is clearly not the law. By the Fourteenth Amendment to the Constitution of the United States, and by Section 1977 of the Revised Statutes (U. S. Code, Tit. 8,

sec. 41) all persons, whether citizens or aliens, are entitled to the equal protection of the laws in respect of matters arising within the territory of the United States.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, this Court quoted the language of the Fourteenth Amendment and said:

> "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by Sec. 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

It may be that Section 41, Title 8, of the United States Code is not in terms binding on the Federal Courts; but it is scarcely to be supposed that the government of the United States intended to countenance in its own courts a form of discrimination which it expressly prohibited in the courts of the States.

The Treaty of 1909, upon which the lower courts

base their refusal to entertain jurisdiction, affords a powerful if not a conclusive argument against their decision. That treaty expressly stipulates that the laws of the United States, on its own side of the boundary line, shall apply "equally and without discrimination to the inhabitants, ships, vessels and boats of both countries". It is conceded that, if the petitioners were Americans, they would be entitled to the relief which they ask; it is denied to them only because they are Canadians. To say that the lack of equality is not in the law but in the enforcement of the law, is a mere quibble, which does not require discussion in this Court.

The fact that the courts to which the petitioners are relegated happen to be the courts of their own country, is immaterial. Those courts are under no obligation to enforce the laws of the United States; and, indeed, this case has been decided on the assumption that they will not do so. It is entirely conceivable (although we admit improbable) that the Canadian courts would decline to take jurisdiction of the present controversy. In any event the courts of the United States cannot abdicate their function of enforcing their own maritime law, on the assumption that some other jurisdiction will, as a matter of comity, afford the petitioners relief.

Conclusion.

The decrees of the Circuit Court of Appeals herein should be reversed and the causes remanded to the District Court with instructions to enter decrees overruling the exceptions to the libels, dismissing the suggestions as to jurisdiction, denying the respondent's motions for dismissal and ordering respondent to file answers to the libels.

February 1, 1932, New York City.

Respectfully submitted,

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
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FILE COPY

FEB 24

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 487.

CANADA MALTING COMPANY, LTD.,
Petitioner,

—against—

PATERSON STEAMSHIPS, LTD.

No. 488.

BRITISH EMPIRE GRAIN COMPANY, LTD.,
Petitioner,

—against—

PATERSON STEAMSHIPS, LTD.

No. 489.

HENRY K. STARNES, doing business as H. K. Starnes & Company,
Petitioner,

—against—

PATERSON STEAMSHIPS, LTD.

REPLY BRIEF FOR PETITIONERS.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
LEONARD J. MATTESON,
JAMES W. RYAN,
Counsel for Petitioners Canada Malting Co., Ltd., et al.

Subject Index.

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The respondent's argument that Canadian law should be applied is contrary to the language of the Treaties involved, and contrary to the well-settled rule as to the law governing torts; while its argument against the enforcement of United States law by United States courts is in conflict with principles repeatedly applied by this Court and is, moreover, wholly unsupported by any ground of necessity or convenience..... 1-13

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REPLY BRIEF FOR PETITIONERS.

The respondent throughout its brief assumes, as did the Circuit Court of Appeals in its opinion, that if the

United States District Court had retained jurisdiction, this case would have been determined according to Canadian law. Counsel for respondent recognizes (at p. 36) that his entire brief leads to that conclusion. Counsel then states (at p. 36) that "This conclusion is fully supported by the following decisions of this Court," and cites eight cases, none of which involved a collision or tort occurring within the territorial limits or waters of the United States, and in none of which was mentioned the question involved in the present case, namely, whether or not a United States Court, within whose territorial jurisdiction a collision or tort has been committed in violation of United States law, must exercise jurisdiction to enforce that United States law, notwithstanding the circumstance that the tort feasor and the victim happen to be aliens of the same nationality.

In discussing "Canadian law" (p. 37, Respondent's Brief) counsel makes the following statements, none of which is supported by citation of the record or by any evidence in the record:

> "That is the law with respect to which the *parties dealt* and under which they *established their rights* in embarking upon this venture in the realm of commerce; similarly that is the law under which the ships were operated and for the violation of which the masters were held at fault following the disaster." (Italics ours.)

What the record actually shows is that the only "dealing" between the parties (or between the owners of the two vessels) was the tort or collision committed within the territorial limits of the United States; that the parties were strangers to each other so far as any

venture or contract was concerned; that the parties "established their rights" by the municipal or maritime law operative at that place in the United States; that "the ships operated" subject to the law of the United States in force at that place, both because the United States was the only sovereign in that area, and because under the Treaty of 1909 it was provided that British ships should navigate subject to United States law while on the United States side of the International Boundary Line; and that the "violation" of law committed by the master of the respondent's vessel was a violation of United States law.

The respondent makes much of the fact that petitioners' cargo was being carried on the "Yorkton" from one Canadian port to another, under a contract of affreightment made in Canada. It is plain, however, that petitioners' contractual relations with the "Yorkton" cannot have the slightest bearing on their claim against the "Mantadoc", with which vessel they had no contractual or other relations whatsoever. Petitioners' relations with the "Mantadoc" consisted solely of the fact that their property was destroyed in a collision due to her fault. And, if the fact is of any importance, the "Mantadoc", which is the respondent's vessel and the only vessel involved in the present action, was not merely passing through American waters but was coming from an American port, Lorain, Ohio (R. 31), and was therefore engaged in commerce with the United States and voluntarily submitting herself and her owner to United States law, quite independently of her being subject thereto because she was navigating in territorial waters of the United States.

The respondent argues the case as if an alien committing a tort in the United States in violation of United

States law had a privilege inherent in his foreign citizenship to insist that the United States Courts should deprive the injured party plaintiff of any United States remedy by ignoring entirely the United States law applicable in that locality to aliens and Americans alike, and should in effect apply Canadian law by declining to exercise their jurisdiction to enforce the violation of United States law.

The respondent cites no reported case (and we have been unable by diligent search to find one) in which any Court has ever held that an alien committing a tort within the United States is entitled to exemption or immunity from liability for violation of United States law in committing that tort, merely because a law of his own country also condemns such acts by its citizens when committed in foreign countries. Such a law would, of course, have no extraterritorial force in the United States, whatever its effect might be if both parties happened, after the tort had been committed, to return to Canada and sue in a Canadian court. Yet the Circuit Court of Appeals in the present case has given such extraterritorial force in the United States to an assumed Canadian law which even a Canadian court would recognize had no such force in the United States.

The effort of respondent's counsel to characterize the Great Lakes as "high seas" outside the territorial limits of either the United States or Canada is answered by the plain language of the Treaty with Great Britain fixing a definitely marked International Boundary Line, and leaving no area of "high seas" in between. (Treaty with Great Britain of July 1, 1908; 35 Stats. at L. 2003.) That Boundary was fixed by a political act of our government, and United States sovereignty up to that line surely cannot be surrendered by the Judiciary.

In *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, an action was brought by a Canadian corporation on a policy of marine insurance on the Canadian steamer "Spartan," to recover a loss by stranding in a fog "on the southwest point of Caribou Island, in Canadian waters" (136 U. S. at p. 410) in Lake Superior, while the vessel was bound from Passage Island to Whitefish Point on the south shore of Lake Superior (136 U. S. at p. 409). This Court, speaking through Chief Justice Fuller, after stating the case, said (at p. 422):

> "The 'Spartan' was a Canadian vessel and was navigating *Canadian waters* between two Canadian ports, and was bound to comply *with the laws of Canada*. The Canadian Statute put in evidence (Vol. I, Stats. Canada, 1880, p. 236) is entitled 'An Act to make better provisions respecting the *navigation of Canadian waters*'. * * *" (Italics ours.)

The foregoing quotation shows clearly that this Court regarded the waters on the Canadian side of the international boundary as territorial waters of Canada; and that the Canadian law, as proved in that case, was limited in its application, to such territorial waters. As shown by the citations in our principal brief (p. 34), the Canadian law in that respect is unchanged. Accordingly, if the petitioners have no right to sue in the courts of the United States, there is no court in which they have such a right. No court is bound to enforce any law excepting its own; and if the courts of the United States will not enforce the United States law which is applicable here, then the petitioners are relegated to the position of suppliants, dependent for the enforcement of their claims on the mere discretion of the various tribunals to which they may apply. We submit that such a situa-

tion is wholly repugnant to the theory of territorial jurisdiction which lies at the basis of the English and American systems of law, and which this Court has repeatedly affirmed. We submit that under any modern system of law there must be some court in which an injured person has a right to relief; and under the theory of law repeatedly followed by this Court (at least in tort cases), that court is the court within whose territorial jurisdiction the wrong was committed. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Blamberg Bros.* v. *U. S.*, 260 U. S. 453; *The Western Maid*, 257 U. S. 419. If an alien has no right, in the courts of the United States, to enforce claims growing out of a breach of the maritime law of the United States, then, as to him, such law is a nullity.

> "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp" (*The Western Maid*, 257 U. S. 419, 433).

It is true that an injured party has the privilege of appealing to the discretion of other courts than those of the locality where he was injured, but such an appeal to discretion is quite different from the exercise of a strict legal right.

There has not been shown to be (and in fact there is not) any Canadian law which applies at the place of this collision. Accordingly, if there is no enforceable law of the United States, then it would appear that this collision occurred in a sort of legal vacuum, where the parties were not subject to any definite standard of conduct. A surrender by the United States of its sovereignty over the waters in question would not alone be sufficient to meet the situation presented in the present case. It may be assumed that such a

surrender of sovereignty would eventually lead to the exercise of sovereignty, or at least of legislative jurisdiction, by some other power; but, as pointed out by Mr. Hunt in his interesting article (see pp. 15 and 16 of our Principal Brief), Canada still adheres to the view that the waters of the Great Lakes are strictly territorial. She has exercised full territorial jurisdiction on her own side of the boundary line, and has not attempted to exercise any jurisdiction or control on the American side, either as to her own vessels or others. We think it may safely be assumed that Canada will never concede that the Great Lakes are "high seas", in view of the fact that they are accessible to seagoing vessels only by travelling some seven hundred and fifty miles through purely Canadian waters. Nevertheless, it is clear that the decision of the Circuit Court of Appeals in this case may prove extremely embarrassing to the Executive branch of our government in its relations with Canada. Under this head we will only mention the questions which have arisen in connection with the enforcement of the National Prohibition laws.

The suggested difficulty of determining on which side of the boundary line a collision occurred seems to us a reason for taking jurisdiction rather than for declining it. The answer to the difficulties raised by the respondent is that on the Great Lakes no court should decline jurisdiction of a cause where it has jurisdiction of the parties, unless it appears by clear proof that the cause of action arose outside its territorial jurisdiction. If this simple and practical course were followed, the question of the exact location of the accident would never arise unless one of the parties undertook to prove it for some reason which he considered important to himself; and if he assumed this burden he would have

an opportunity to prove his case. Unless the location could be definitely proved, the court would apply its own law, as it does in all cases where there is no adequate proof that a foreign law is applicable. The confusion which the respondent professes to fear can only arise from the court's refusal to take jurisdiction, as in this case.

In this connection it is significant that counsel for respondent, like ourselves, have been unable to find any case where an American admiralty court has ever before declined to take jurisdiction of a case of collision happening anywhere in the world.

The suggestion that the right to bring a suit in our courts is inherent in the right of citizenship and is limited to citizens, is clearly erroneous. If this argument were sound, it would seem to follow that even if the offending vessel had been American, the Canadian libellants might have been denied redress if it appeared that the offending vessel could be proceeded against in Canada. We see no distinction whatever in principle.

The argument throughout respondent's brief is inconsistent with and simply ignores the significant proviso in Article I of the Root-Bryce Treaty of 1909 (quoted at p. 32 of Respondent's Brief) as follows:

> "* * * subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

The plain meaning of the foregoing language is that the maritime law of the United States shall apply to both

British and American vessels while on the American side of the international boundary, provided it applies equally and without discrimination as to both; and similarly Canadian law applies to American and British vessels while on the Canadian side of the boundary. This is not, therefore, a case in which treaty rights intervene, or an action in contract involving the distribution of a fund which is in a foreign country and outside the control of a United States court (as in *Charter Co.* v. *Bowring,* 281 U. S. 515). The cases of *The Eagle* and *The Avon,* quoted at pages 24 and 25 of respondent's brief, obviously cannot be cited as to the effect or interpretation of the Root-Bryce Treaty of 1909, because *The Eagle* was decided in the year 1868 and *The Avon* in 1873.

The scattered *dicta* which respondent's counsel have extracted from opinions and quoted in their brief, to the effect that admiralty jurisdiction in suits between foreigners is discretionary, will be found, on examination of the full opinions, to be but a short method adopted by the court of saying that as the cause of action accrued outside the territorial jurisdiction of the United States courts and under a foreign law, the parties, in certain special cases, will be relegated, for the enforcement of that foreign law, to the courts of the foreign country in whose territorial jurisdiction the case arose, who are charged with the duty of interpreting and enforcing that law. None of the cases cited in respondent's brief is a case in which, as in the present case, the cause of action accrued within the territorial jurisdiction of the court which declined to take jurisdiction, thereby declining to enforce its own sovereign's law. Under such circumstances, even if the case were one of discretion, there is such an abuse of discretion as to constitute error in

law, because the United States court is in substance repudiating the law of its own sovereign.

It is true that petitioners did not argue, in their principal brief, the questions of convenience upon which the respondent lays so much stress. We do not concede, however, that the trial of this cause in Buffalo will cause any inconvenience to any of the parties involved. The respondent has its headquarters at Fort William, Ontario (R. 47). A month or more after this action was begun respondent began an action against the owners of the "Yorkton" at Toronto, more than eight hundred miles east of Fort William (R. 50, 69, 73); and their attorneys are at Montreal, several hundred miles east of Toronto (R. 53, 54). At least one of the libellants also resides in Montreal (R. 41) which is at least a thousand miles from Fort William, where respondent has its headquarters. Accordingly, the suggestion that there is any one place which is readily accessible to all the parties is wholly unfounded. As a matter of fact, Buffalo, where the owners of both the "Mantadoc" and "Yorkton" have vessels calling frequently (R. 20, 73, 74, 76, 77) would be at least as convenient for all parties interested as any place in Canada.

The grounds of convenience which actuated the Circuit Court of Appeals in exercising its discretion, and which respondent urges in its brief, are strange indeed when considered in the light of usual admiralty practice. In collision cases much of the testimony is ordinarily taken by deposition or foreign commission; and in some of the Circuits (as in the Fifth Circuit, at New Orleans) all of the testimony in all admiralty cases is required by long-standing rule to be taken by deposition or commission, so that the trial court hears in open court only the arguments of counsel. When the witnesses are more than one hundred miles from the place

of trial (as very commonly happens), they are, by Act of Congress, entirely outside the trial court's control by subpoena or otherwise, and their testimony can only be taken by deposition or commission. In the present case, the petitioners are the suing parties and under the burden of establishing that the respondent was negligent; and they are not complaining of any suggested inconvenience. The respondent's own officers and crew are certainly under its control and available as witnesses to testify whether the charge of negligence against them is correct; and in that respect the respondent, *on grounds* of convenience, has a great advantage over the petitioners, whose cargo was in the custody of persons who have never been under petitioner's control. Finally, it appears that all the witnesses are sailors, who will normally be on board vessels navigating the Great Lakes, and who, so far as appears, are just as likely to be found in a United States port as in a Canadian port.

Respondent's argument (at p. 25 of its Brief) based on the litigation which grew out of the collision between the "New York" and the "Conemaugh", finds no support in the decision. It was not suggested in that case that the measure of recovery under Canadian law would be different from the rule applied in the United States. Accordingly the effect of any such difference was not considered or decided.

In the present case the lower courts apparently considered that the supposed difference in law was a reason for declining jurisdiction. They seem to have felt that the supposedly more favorable American rule should only be applied in favor of American citizens. They treat it not as an American law but as an American privilege. If the American law is wrong it can be changed by Congress; but so long as it remains in force

we submit that it should be applied impartially, regardless of the nationality of litigants, in all cases arising within the territorial limits of the United States. Surely our courts cannot decline to enforce the laws of the United States on the theory that some other system of law is more just and equitable.

If one Canadian sailor assaulted another in Buffalo, it would scarcely be argued that the victim should be denied access to the courts of this country because the damages recoverable for such an injury under American law were greater than under Canadian law. We see no distinction in principle between such a case and the present.

We will close this brief by quoting an extract from the opinion of this Court in one of the cases cited by the respondent, *Panama Railroad* v. *Napier Shipping Co.*, 166 U. S. 280, 285-6:

> "The fact that the cause of action arose in the waters of a foreign port is immaterial. While in some cases it is said that a court of admiralty has jurisdiction of all torts arising upon the high seas, or upon the navigable waters of the United States, *The Commerce*, 1 Black 574; *Holmes* v. *O. & C. Railroad*, 5 Fed. Rep. 75; *The Clatsop Chief*, 8 Fed. Rep. 767, the connection in which those words are found indicate that they were not used restrictively; and the law is entirely well settled both in England and in this country, that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court.
>
> * * * * * * * *
>
> Indeed, large numbers of collisions arise upon the Canadian side of the St. Clair, Detroit and St. Lawrence rivers, which would not be cognizable

in our courts, if the general proposition claimed by the appellant were true, since by the treaty between this country and Great Britain the boundary line is located in or near the centre of the river.

Had both parties to the libel been foreigners, it might have been within the discretion of the court to decline jurisdiction of the case, though the better opinion is that, even under those circumstances, the court will take cognizance of torts to which both parties are foreigners; at least in the absence of a protest from a foreign consul. *The Maggie Hammond,* 9 Wall. 435; *The Belgenland,* 114 U. S. 355; *The Courier,* Lushington, 541; *The Havana,* 1 Sprague 402; *The Invincible,* 2 Gall. 29; *The Johann Friederich,* 1 W. Rob. 35; *The Charkieh,* L. R. 4 Ad. & Ec. 120; *The Vivar,* 2 P. D. 29; *The Anne Johanne,* Stuart, Vice Adm. 43; *Thomassen* v. *Whitwell,* 9 Ben. 113; *Chubb* v. *Hamburg-American Packet Co.,* 39 Fed. Rep. 431."

If the better opinion is that our admiralty courts should take jurisdiction of a suit between foreigners based upon a tort committed in a foreign country, how can they decline to take jurisdiction of a tort committed in American territorial waters, the national character of which is clearly pointed out by this Court in the passage above quoted?

February 23rd, 1932.

Respectfully submitted,

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CHARLES ELM

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 487

CANADA MALTING COMPANY, LTD.,
Petitioner-Libelant,
against
PATERSON STEAMSHIPS, LTD.,
[redacted] 488 *Respondent.*

BRITISH EMPIRE GRAIN COMPANY, LTD.,
Petitioner-Libelant,
against
PATERSON STEAMSHIPS, LTD.,
[redacted] 489 *Respondent.*

HENRY K. STARNES, doing business as
H. K. STARNES & COMPANY,
Petitioner-Libelant,
against
PATERSON STEAMSHIPS, LTD.,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

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Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO AN APPLICATION TO THIS COURT FOR WRIT OF CERTIORARI.

Facts.

The undisputed facts, upon which the District Court exercised its discretion and declined jurisdiction are:

(1) Each of the libelants, as well as the respondent, are citizens and residents of Canada. (R. 4, 61, 70.)

(2) Both vessels involved in the collision are of Canadian registry and ownership. (R. 17, 24, 82, 83, 89.)

(3) The officers and members of the crews of both vessels were Canadian citizens and residents (R. 18, 25, 84, 90), and are not subject to compulsory attendance as witnesses in the District Court. (R. 43, 107.)

(4) The contracts of affreightment for the carriage of the cargo, later damaged as a result of the collision, were made in Canada. (R. 18, 25, 83, 90.)

(5) The cargo, later damaged as a result of the collision, was laden at a Canadian Port (Port Arthur), and was destined for another Canadian Port (Montreal). (R. 4, 61, 70.)

(6) The Dominion Wreck Commissioner had determined that the masters of both vessels were at fault for the collision. (R. 51-60.)

(7) Action was pending in the Canadian Admiralty Court, there instituted by this respondent, for the judicial

determination of liability as between the colliding vessels. (R. 21, 34, 86, 98.)

In determining to decline jurisdiction, the District Court based its decision upon these undisputed facts, and also upon the provisions of the Root-Bryce Treaty of 1909 and the decisions of this Court. (R. 132-138, 141-144.) The District Court also found that no failure of justice would result by refusing jurisdiction and relegating the parties to the Courts of their citizenship, saying "That the rule in this Court is more favorable to cargo owners is insufficient reason for retaining jurisdiction." (R. 135.)

The Circuit Court of Appeals, in affirming the decision of the District Court (opinion reported at 51 Fed. (2d) 1007), held that by virtue of the Root-Bryce Treaty, as well as the decisions of this Court, the waters of Lake Superior are international boundary waters occupying, by virtue of the Root-Bryce and preceding treaties, the status of high seas, and that the law of the flag of the colliding vessels (*i. e.*, the Canadian Law) must be applied; and that the District Court had discretion to decline jurisdiction, which discretion had been exercised without abuse. The decrees of the District Court dismissing the libels and remitting the libelants to their remedies in the Courts of the Dominion of Canada were, therefore, affirmed. (R. 177-182.)

I.

The decision of the Circuit Court of Appeals that the law of the flag must be applied was correct.

In contending that the decision of the Circuit Court of Appeals is wrong, the petitioners first set up the proposition that since the collision occurred within the territorial

waters of the United States, the law of the place must be applied, and the rights of the parties determined according to the law of the place, *i. e.*, the law of this country.

In support of this proposition petitioners cite several decisions of this Court, all of which, with a single exception (*i. e.*, Smith v. Condry, 1 How. 28), assert the application of the doctrine of *lex loci delicti* solely with respect to civil liability for a tort arising either at common law or because of statutory provision. That the principle therein asserted has no application whatever to the case of a maritime tort, such as collision, is sufficiently plain without argument, since a maritime tort such as collision gives rise to a *jus in re*, a right or privilege which is enforcible wherever the offending ship may be found. The China (The China v. Walsh), 74 U. S. 53, 68; The John G. Stevens, 170 U. S. 113, 122, 123; and cases cited.

Nor does the decision in the case of Smith v. Condry furnish authority for the proposition asserted by petitioners, since that case was later considered and definitely rejected by this Court in the case of The Eagle, 75 U. S. 15, where it was urged as authority upon the identical proposition, viz., that the admiralty lien for collision occurring between two American vessels in the Canadian waters of the Detroit River must depend upon the law of the place where the alleged right occurred. The assertion of Smith v. Condry as a controlling authority was similarly denied by the Circuit Court for the Northern District of Ohio in the case of The Avon, Fed. Cases No. 680, where the Court held that an American vessel was entitled to recover against a Canadian ship for damages arising out of a collision on the Welland Canal.

It is clear that since the source of the maritime lien or privilege arising from the collision is in the general maritime law itself, the extent of such lien or privilege rests entirely upon the maritime law and is not at all dependent upon or measured by the *lex loci delicti*, as though occurring upon the land.

This principle received the recognition of this Court in the case of The Eagle, *supra*, where it was held that the circumstance that two American vessels collided in Canadian waters on the Detroit River constituted no objection to the exercise by our District Courts of the grant of admiralty and maritime jurisdiction given by the Judiciary Act of 1789, and that the cause was properly determined according to the practice and principles of our Courts of Admiralty, *irrespective of any local law.* (Italics ours.)

Similarly in the case of The New York, 175 U. S. 187, where collision between two American ships occurred concededly in waters upon the Canadian side of the Detroit River, the Federal courts assumed and retained jurisdiction to final disposition, applying our maritime law. In the case of The Avon, *supra*, our District and Circuit Courts assumed and retained jurisdiction over a Canadian vessel for damage received by an American ship by reason of a collision occurring in the Welland Canal, which is wholly within the territorial limits of the Dominion of Canada, it being there determined that the maritime law affords the measure of right and does not yield to the local law. In U. S. v. Rodgers, 150 U. S. 247, this Court in upholding the jurisdiction of our Courts with respect to an assault committed on board an American vessel while traversing waters upon the Canadian side of the Detroit River, held those waters, from shore to shore, to be within the admiralty and maritime jurisdiction of the United States.

See also:

Thompson Towing & Wrecking Ass'n v. McGregor, 207 Fed. 209.

The adoption of the proposition advanced by petitioners would mean the reversal by this Court of the cases of The Eagle, *supra;* The New York, *supra;* U. S. v. Rodgers, *supra;* and of the principle set forth in The Avon, *supra,* because in all those cases the tort arose in waters within the territorial limits of the Dominion of Canada, and upon the Canadian side of the international boundary extending through the Great Lakes.

It follows that if the cases of The Eagle, *supra;* The New York, *supra;* and The Avon, *supra,* were rightly decided, then in any case where two Canadian ships, navigating the Great Lakes, collide upon the American side of the international boundary line, jurisdiction of such collision is properly in the Courts of the Dominion of Canada, where the respective rights of the parties will be determined according to the law of their common flag. It results that no possible prejudice can result to petitioners from the relegation of their claims by our Courts to their home forum.

Further, the proposition advanced by petitioners is not in consonance with the provisions of the Root-Bryce Treaty of 1909, 36 Stat. 2448. That treaty, by its definition of boundary waters and by the provisions of Article I thereof, made *all the waters from main shore to main shore* of the Great Lakes and their connecting waterways forever free and open for the purposes of navigation and commerce to the inhabitants and ships of both countries *equally.* (Italics ours.) It results that the rights of navigation and commerce therein reciprocally stipulated extend to the full

limit of the boundary waters, wholly irrespective of the location of the international boundary line as geographically laid down between the two countries. Article I in express terms vests in the owners of Canadian ships navigating such boundary waters the right to have any controversy arising through such navigation determined by the law of their own country. This follows since the local laws and regulations therein referred to must not be inconsistent with such privilege of free navigation and must apply equally and without discrimination of the inhabitants and ships of both countries. No such inconsistency may be permitted, therefore, with respect to the rights and obligations which arise as an incident to such freedom of navigation and commerce.

The entire scope of the Root-Bryce Treaty, creating, as it did, new international law with respect to the use, flow and diversion of the boundary waters separating the two countries, is in opposition, and contrary to the proposition advanced by petitioners.

With reference to the opinion of the Secretary of State cited in support of petitioners' contention, the same related entirely to the question of the taking of property from either side of the international boundary line, as the case might be, and as relating to such property right, was no doubt, then rightly rendered. In any event, in the letter cited, specific reference is made to the common right of navigation and transit upon the waters of the Great Lakes, and the opinion rests solely upon the question of fishing rights affecting those waters. However, in view of the later provisions of the Treaty of 1908 concerning such fisheries, and providing for international regulations therefor to be made by an international commission appointed for the purpose, the opinion referred to has no present force.

Further, the proposition advanced by petitioners, if sound, must apply alike under all circumstances. If, therefore, the instant causes had been instituted before the Admiralty Courts of the Dominion of Canada, would petitioners be able to there successfully maintain that the law of the United States, as being the law of the place, must apply? Obviously not, since that forum would necessarily and properly apply the Canadian Law, which determines the extent of the obligation of each colliding vessel sailing under its flag. See The Eagle Point, 142 Fed. 453, Cert. denied, 201 U. S. 644.

Since the maritime law affords the measure of right applicable here, rather than the local law, the Circuit Court of Appeals was entirely correct in applying the rule set forth in The Scotland, 105 U. S. 24, 29, 30, upon the ground that the collision occurring upon the waters of the Great Lakes was to be dealt with as though happening upon the high seas, and that the law of the flag must be applied. If the uniform characteristic of the maritime law is to be preserved, as this Court has more than once declared, the decision of the Circuit Court of Appeals must be upheld. Any other conclusion would inevitably lead to great confusion in every collision case arising upon the Great Lakes and their connecting channels, and would result in a necessary determination as to the place and point of collision as an original question of fact before it would be possible to determine whether the law of the United States or that of Canada would be applied thereto. Certainly such a result does not commend itself to sound reason.

II.

Retention of jurisdiction by the District Courts in admiralty causes pending between foreigners is a matter of privilege and not of right.

Petitioners contend secondly that the District Court had no discretion to decline jurisdiction in these Admiralty Causes even though the parties are not citizens of the United States.

In urging this proposition petitioners cite various authorities. None of these authorities, however, furnishes support for the claim that a District Court, sitting in Admiralty must retain jurisdiction of a suit brought by one foreigner against another foreigner.

The Second Employers' Liability cases cited by petitioners (223 U. S. 1) had to do with the obligation of State Courts to enforce remedies created by Federal Statutes. The question of the rights or privileges of foreigners was not involved. It was held that the several states being part of the Federal Government are bound both by law and the Constitution of the United States to enforce such remedies. Note the reasoning of the Court at page 57, where the decision in Claflin v. Houseman, 93 U. S. 130, 136, is quoted extensively.

Examination of the opinion of the Court in Cohens v. Virginia, 19 U. S. (6 Wheat.) 264, shows that the language cited by petitioners was employed by Chief Justice Marshall in connection with the holding at page 405 that the Court's jurisdiction was not arrested by the circumstance that a state was a party.

In the case of Chicot County v. Sherwood, 148 U. S. 529, it was determined that the jurisdiction of the Courts of the United States over controversies between citizens of different states could not be impaired by state laws regulating the modes of redress against counties in the State.

Without specifically referring to the remaining citations urged in support of petitioners' contention, it is to be observed that none of them deal with the question of admiralty and maritime jurisdiction or with aliens as parties in admiralty cases.

With reference to the grant of admiralty and maritime jurisdiction contained in Section 41 of the United States Code, there is, of course, no question but that the subject matter of the action, together with acquisition of control by the Court over the property or person, irrespective of the nature of ownership or of citizenship, is sufficient to confer jurisdiction upon a District Court of the United States sitting in admiralty.

However, the contention of petitioners that having once acquired jurisdiction, the District Court was bound to retain such jurisdiction is not borne out by the authorities. It has been the holding of this Court in several cases, and of the lower Federal Courts as well, that the retention of jurisdiction in a suit in admiralty where all the parties are foreigners is not an absolute right, but a privilege only, since a Court of Admiralty is under no obligation to retain jurisdiction in such case.

The principle was recently flatly stated by this Court in the case of Charter Shipping Co., Ltd. v. Bowring, Jones & Tidy, Ltd., 281 U. S. 515, 517, where it was said in an action brought in an American Admiralty Court by one

British corporation against another British corporation for the recovery of a general average deposit made in London:

> "The retention of jurisdiction of a suit in Admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed unless abused. The Belgenland, 114 U. S. 355; 368; The Maggie Hammond, 9 Wall. 435, 437."

Again, in the case of Langnes v. Green, 282 U. S. 531, 544, this Court again said:

> "Admiralty courts, for example, have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless, 'the question is one of discretion in every case, and the Court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.' The Maggie Hammond, 9 Wall. 435, 457; The Belgenland, 114 U. S. 355, 368; Charter Shipping Co. v. Bowring, Jones & Tidy, 281 U. S. 515, 517."

In the case of The Maggie Hammond, 9 Wall. 435, at page 457, this Court specifically approved the statement of Mr. Parsons that the question is one of discretion in every case where the subject matter of the controversy is of a maritime nature, and that the Court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum. In the case of The Belgenland, 114 U. S. 355, the general doctrine as set forth in The Maggie Hammond was flatly approved.

It would seem, therefore, that the proposition contended for by petitioners lacks the sanction and authority of this Court, since this Court has clearly again and again stated the principle of discretion in admiralty actions pending between foreigners without any limitation whatsoever.

Our Courts, both State and Federal, were created primarily for the establishment of rights and the redress of wrongs accruing to the citizens of the several States and of the United States.

Neither the statute (Section 41, United States Code), which confers original admiralty and maritime jurisdiction, nor the provisions of the Constitution by virtue of which such statute was enacted, can be construed to give to foreigners a right to demand of our Federal Courts that cognizance be taken of controversies pending between such foreigners. At law, the Federal Courts have no jurisdiction, by virtue of the Constitution and the enabling statute over actions where both parties are foreigners. See Cunard S. S. Co. v. Smith, 255 Fed. 846, and cases cited.

In Admiralty, the retention of jurisdiction in cases where both parties are foreigners is a matter of privilege and not of right. Hence the retention of jurisdiction in such cases has been determined to be a matter of discretion in the District Court. Any other construction would result in an invitation to alien litigants to avail themselves of the American Admiralty Courts whenever some particular litigant thought that the American law or procedure would be more favorable to his case than the law of his home forum.

Such is precisely the case in the instant causes, since the retention of jurisdiction by our Court is here sought solely because these Canadian libelants desire to obtain advantage of the American rule of law which permits recovery of the total cargo loss, sustained by reason of the collision, from this respondent if both vessels were at fault; whereas, under Canadian law, to which the parties are subject and under which the contract of carriage was made and begun, their right of recovery as against respondent, would

be limited to recovery of a moiety of the loss. That a finding of mutual fault may be reasonably anticipated is evidenced by the formal report of the Dominion Wreck Commissioner wherein the Masters of both colliding vessels were found at fault. (R. 51.)

What reason then exists why our Courts should hear controversies between foreigners who have a common forum and law?

III.

The District Court rightly exercised its discretion in declining to retain jurisdiction.

The Circuit Court of Appeals rightly held that they found no abuse of discretion by the District Court in declining to retain jurisdiction and in remitting the parties to their home forum. Petitioners do not attack this finding beyond their insistence upon the absence of any discretion in the District Court to decline jurisdiction.

From the decisions of this Court cited in support of the last point, it is clear that the primary circumstance in the exercise of such discretion is whether under all the circumstances justice would be done as well by remitting the parties to their home forum. Upon the basis of the undisputed facts, all of which were considered by the District Court in reaching its conclusion, it is clear that remitting the petitioners to their home forum could work no injury as every right and obligation accruing to the parties could be there adjudicated under their common law in an action already pending between the parties.

Moreover, the consideration as to the convenience of witnesses was an added consideration with the District Court. Not only are the witnesses in Canada and outside

the jurisdiction of our Court, but they are Canadian subjects and citizens who are not in any manner subject to the control or jurisdiction of our forum. They could not be compelled to come into this country and testify, nor could they be compelled to testify by deposition taken in Canada for use in our forum.

That jurisdiction will be declined in admiralty causes between foreigners where the witnesses are all without the United States and no failure of justice will result, see:

Charter Shipping Co. Ltd. v. Bowring, Jones & Tidy, Ltd., *supra.*

The New Texas, 1926 A. M. C. 1514.

Goldman v. Furness, Withy & Co., 101 Fed. 467.

The Iquitos, 286 Fed. 383.

Such was the finding of the District Court, which should be sustained.

Conclusion.

The District Court rightly exercised its discretion in refusing to retain jurisdiction of the cases and in remitting the parties to their home forum. The Circuit Court of Appeals properly affirmed the determination of the District Court. The petitions for certiorari should, therefore, be denied with costs.

Respectfully submitted,

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CHARLES ELMORE

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OCTOBER TERM, 1931.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

RAY M. STANLEY,
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1931.

CANADA MALTING COMPANY, LTD., *Petitioner*, *against* PATERSON STEAMSHIPS, LTD., *Respondent.*	No. 487
BRITISH EMPIRE GRAIN COMPANY, LTD., *Petitioner*, *against* PATERSON STEAMSHIPS, LTD., *Respondent.*	No. 488
HENRY K. STARNES, doing business as H. K. STARNES & COMPANY, *Petitioner*, *against* PATERSON STEAMSHIPS, LTD., *Respondent.*	No. 489

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT.

These cases come before the Court upon orders, entered herein on the 30th day of November, 1931, by this Court granting the petition of the petitioners for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its decrees entered in these suits July 28th, 1931 (R. pp. 109-110), affirming the decrees of the United States District Court for the Western District

of New York (Judge John R. Hazel sitting). (R. pp. 85-96.)

The causes were instituted by the filing of libels *in personam* with a prayer for foreign attachment. Jurisdiction over the respondent was obtained under said libels for the seizure of the Steamer *Lachinedoc*, the property of the respondent, at the Port of Buffalo.

The actions are brought for the recovery of damages claimed to have been sustained by the respective petitioners as the owners of a cargo of grain laden on board the Steamer *Yorkton* by reason of the sinking of that vessel following a collision occurring between the Steamer *Yorkton* and the Steamer *Mantadoc* on Lake Superior, July 10th, 1930. Fault is urged solely against the Steamer *Mantadoc*. Respondent is the owner of the Steamer *Mantadoc*. (R. pp. 2-5, 36-38, 41-43.)

The cases were heard in the District Court upon exceptions by the respondent to the libels (R. pp. 8-9, 46-47); together with a suggestion by the respondent, in each suit, that the Court ought not to entertain or exercise further jurisdiction in the cause (R. pp. 7-8, 45-46); and also upon motions by the respondent, made in each suit, upon the libels and upon affidavits, that the Court exercise discretion and refuse to take and entertain further jurisdiction, that it dismiss the libels and remit petitioners to remedies in the Courts of the Dominion of Canada, and for other incidental relief. (R. pp. 5-6, 39-40, 44-45.)

Judge Hazel wrote an opinion granting the motions of respondent, officially reported at 49 Fed. (2nd) 802. (R. pp. 78-82.) Upon petition for rehearing, Judge Hazel wrote a further opinion affirming the prior determination, officially

reported at 49 Fed. (2nd) 804. (R. pp. 83-85.) Decrees were thereupon entered in the respective suits sustaining the exceptions of respondent to the libels, declining to take and entertain further jurisdiction in the causes, dismissing the libels, remitting the petitioners to their remedies in the Courts of the Dominion of Canada, and directing that respondent appear and file security in any action instituted by the petitioners in the Admiralty Courts of the Dominion of Canada. (R. pp. 85-96.)

Upon appeal by petitioners, the Circuit Court of Appeals for the Second Circuit affirmed the decrees of the District Courts; its opinion being officially reported at 51 Fed. (2nd) 1007. (R. pp. 103-108.)

Facts.

The following facts and circumstances appearing in respondent's moving papers, all of which are undisputed, were regarded by the District Court as warranting the refusal to entertain further jurisdiction.

(1) Each of the petitioners, as well as the respondent, are subjects, residents and citizens of the Dominion of Canada. (R. pp. 3, 36, 41.)

(2) Both vessels involved in the collision, *i. e.*, the Steamer *Yorkton* and the Steamer *Mantadoc*, are owned by Canadian corporations and are of Canadian registry. (R. pp. 9, 10, 13, 14, 47, 48, 51, 52.)

(3) The officers and members of the crew of both vessels are Canadian citizens and residents (R. pp. 10, 14, 49, 52) and are not subject to compulsory attendance as witnesses in the District Court. (R. pp. 25, 63.)

(4) The contracts of affreightment for the carriage of the cargo, later damaged as a result of the collision, were made in Canada. (R. pp. 10, 14, 48, 52.)

(5) The cargo, later damaged as a result of the collision, was laden on board the Steamer *Yorkton* at one Canadian port (Port Arthur) for transportation to and delivery at another Canadian port (Montreal). (R. pp. 10, 14, 48, 52.)

(6) Following the collision, the Wreck Commissioner of the Dominion of Canada held a formal investigation as required by law respecting the circumstances of the collision. (R. pp. 19, 56, 30-36.) It was determined by the Dominion Wreck Commissioner that the masters of both vessels were at fault for the collision. (R. pp. 35, 36.)

(7) That an action had been instituted by this respondent in the Admiralty Court of the Dominion of Canada for the judicial determination of liability as between the colliding vessels and their owners. (R. pp. 12, 16, 19, 50, 54, 57.)

In determining to grant the motions made by respondent and to dismiss the libels, the District Court asserted that it was vested with discretion whether to retain or decline jurisdiction, citing *Charter Shipping Co., Ltd. v. Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515. In determining to exercise such discretion, the Court was motivated by the undisputed facts and circumstances recited above. It was found that the circumstances were such that the Court was warranted in refusing to retain jurisdiction, and that no injustice would result to petitioners by remitting the parties to their home forum, it being further said: "That the rule in this Court is more favorable to the cargo owners is insufficient reason for retaining jurisdiction." (R. p. 79.)

Upon application for rehearing, the District Court reiterated the existence of discretion to retain or refuse jurisdiction; and, as an additional reason for declining jurisdiction and relegating the parties to the Courts of the country of their residence and citizenship, cited the Root-Bryce Treaty of 1909 as making the waters of the Great Lakes, with respect to navigation, international waterways equally free to the citizens of Canada and of the United States alike. (R. pp. 83-85.)

The Circuit Court of Appeals affirmed the decrees below. The Court referred to the undisputed facts and circumstances relied upon by the District Court. The arguments of petitioners were considered, it being said by the Court that the most recent statements of this Court did not assert the limitation contended for, citing *Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515, and *Langnes v. Green*, 282 U. S. 531. It was determined that by the provisions of the Root-Bryce Treaty of 1909 (36 Stat. 2448) collisions upon the Great Lakes are to be dealt with as though on the high seas, citing *The Eagle*, 8 Wall. 15, and *The Avon*, Fed. Cases No. 680, and that the law of the flag of the colliding vessels must be applied, *i. e.*, Canadian Law. It was held that the District Court had discretion whether or not to retain jurisdiction, and that there had been no abuse of such discretion in remitting the parties to their home forum. (R. pp. 103-108.)

The record is devoid of any explanation as to the failure of the petitioners to pursue their remedies *in rem* against the alleged offending vessel (The *Mantadoc*) through seizure wheresoever she might be found in any port on the Great Lakes, whether Canadian or American. Nor is there contained in the record any suggestion that petitioners were unable to obtain jurisdiction over this respond-

ent, or to secure an effectual adjudication of the rights of the parties, in their home forum, or to there obtain a full measure of justice.

The sole reason for the institution of these actions in an Admiralty Court of the United States, where all the parties are foreigners, was the desire of petitioners to obtain the benefit of the rule of law enforced in this country, viz., that a cargo owner suffering loss by reason of collision, may, if innocent, recover from the noncarrying vessel involved in the collision, or the owners thereof, the entire amount of such loss, if both vessels were at fault. Whereas, under the rule enforced in Canada, in cases of mutual fault, cargo owner may recover only a moiety of its loss from the noncarrying vessel. (R. pp. 19, 57.) That a finding of mutual fault may be reasonably anticipated is evidenced by the formal report of the Dominion Wreck Commissioner which determined that the masters of both colliding vessels were at fault. (R. pp. 30-36.) The reason for the failure of these Canadian petitioners to resort to their home forum for the adjudication of their rights as against this Canadian respondent is thus made apparent.

While it is understood that the allegations of the libel with respect to the place of collision and the asserted faults of the *Mantadoc* are to be taken as true for the purposes of exceptions and motions to dismiss the libels and are not therefore traversed; nevertheless, in the event that the causes proceeded to the requirement of answer, and such allegations proved to be important by reason of the decision of this Court, traverse thereto would, no doubt, be taken by respondent.

FIRST POINT.

IN EVERY CASE OF SUITS OF A MARITIME NATURE PENDING BETWEEN FOREIGNERS IN OUR ADMIRALTY COURTS, THE QUESTION OF RETENTION AND EXERCISE OF JURISDICTION IS A MATTER OF DISCRETION.

It was argued by respondent in the District Court, and so held, that the question of the retention and exercise of jurisdiction in these causes was one of discretion to be determined by the District Court. This determination was properly affirmed upon appeal by the Circuit Court of Appeals.

Recent expressions of this Court were relied upon in the Courts below as establishing this principle, *i. e.*: *Charter Shipping Co. v. Bowring, Jones & Tidy*, 281 U. S. 515, and *Langnes v. Green*, 282 U. S. 531.

In *Charter Shipping Co. v. Bowring, Jones & Tidy*, this Court said, at page 517:

> "The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed, unless abused. *The Belgenland*, 114 U. S. 355, 368; *The Maggie Hammond*, 9 Wall. 435, 457."

In *Langnes v. Green*, this Court said, at page 544:

> "Admiralty courts, for example, have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless, 'the question is one of discretion in every case, and the Court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.' *The Maggie Hammond*, 9 Wall. 435, 457; *The Belgenland*, 114 U. S. 355, 368; *Charter Shipping Co. v. Bowring, Jones & Tidy*, 281 U. S. 515, 517."

Reference to the prior decisions of this Court, as well as those of the lower Federal courts, furnish a considerable number of similar expressions of the principle so enunciated.

See:

The Belgenland, 114 U. S. 355, 364;
The Maggie Hammond, 9 Wall. 435, 457;
Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 285;
Taylor v. Carryl, 20 How. 583, 611;
Davis v. Leslie, 1 Abb. Adm. 123; Fed. Cases No. 3639;
The One Hundred Ninety-four Shawls, 1 Abb. Adm. 317; Fed. Cases No. 10521;
The Bee, 1 Ware 336; Fed. Cases No. 1219;
Bucker v. Klorkgetter, 1 Abb. Adm. 402; Fed. Cases No. 2083;
Meier v. The Brisk, 4 Ben. 252, Fed. Cases No. 9901;
Bernhard v. Creene, 3 Sawy. 230; Fed. Cases No. 1349;
The Infanta, Abb. Adm. 263; Fed. Cases No. 10,030;
Fairgreve v. Marine Ins. Co., 94 Fed. 686;
Goldman v. Furness, Whithy & Co., 101 Fed. 467;
The Iquitos, 286 Fed. 383;
The New Texas, 1926 Am. Mar. Cases 1514.

A. The Exercise of the Constitutional Grant of Admiralty and Maritime Jurisdiction is not Necessarily Mandatory.

Petitioners contended in the courts below and now contend before this Court, that the grant of admiralty and mar-

itime jurisdiction conferred upon the District Court is mandatory, and that with respect to a collision occurring within the territorial limits of the United States no discretion is vested in the District Court to decline jurisdiction.

Section 2 of Article 3 (Clause 1) of the Constitution of the United States extends the judicial power to "all cases of admiralty and maritime jurisdiction." The grant of admiralty and maritime jurisdiction reposed in the District Courts (now embodied in Sections 41 and 371, Title 28, of the United States Code) was enacted by Congress in pursuance of the constitutional provision.

The inclusive provision of "all cases of admiralty and maritime jurisdiction" clearly referred to that system of law then in existence and which was familiar to the framers of the Constitution.

It was said by this Court in *Panama Railroad Company v. Johnson*, 264 U. S. 375, at page 385, 386:

> "As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law, under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in colonial times and during the Confederation, and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate

and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this Court, gave effect to it. Practically, therefore, the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States,—subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require."

See also:

The Lottawanna, 21 Wall. 558;
The Belfast, 7 Wall. 624;
Waring v. Clarke, 5 How. 441.

In the latter case, it was said at page 457:

"There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately."

The constitutional grant of admiralty and maritime jurisdiction could, and did, import no more, by its terms, than to invest the United States with that system of law then known and recognized; *i. e.,* the familiar general maritime law, both as to its substantive and procedural features.

The grant thus given was not then precisely defined. Moreover, the exact definition of the limits of the grant was difficult by reason of the presumably variant usages pre-

vailing in the states which had theretofore enjoyed the exercise of such jurisdiction, as well as by reason of the complex character of our scheme of government; and because of other factors.

See:

The Lottawanna, 21 Wall. 558;
The St. Lawrence, 1 Black 522.

It is apparent that, following the constitutional grant and the enactment of judicial power in pursuance thereof, there was required of necessity, the future definition of such power and jurisdiction by means of judicial decision, in order to define the limits of the power so granted. In addition, consideration was necessarily to be accorded the subsequent enactments of Congress which altered, modified or supplemented such general maritime law as experience or changing conditions required.

That general maritime law, as so adopted, and as developed and supplemented by judicial decision and Congressional enactment, today constitutes the law of the nation with respect to matters of admiralty and maritime jurisdiction.

See:

Butler v. Boston & S. S. Co., 130 U. S. 527, 557;
Southern Pacific Co. v. Jensen, 244 U. S. 205, 215.

In the latter case it was said at page 215:

"Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions * * * and further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal Courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."

The development of the admiralty and maritime jurisdiction beyond the scope of waters within the ebb and flow of the tide well illustrates the point. It was natural, following the adoption of the Constitution and through the early years of the history of the nation, that the boundary of admiralty jurisdiction should be measured by tide water. It was not until the decision in the case of *The Genesee Chief*, 12 How. 443, that this limitation was determined to be inadequate. Then, by reason of changed conditions, and the development of the country, it was there declared that such jurisdiction extends to all public navigable waters, irrespective of the ebb and flow of the tide; it being determined that the Great Lakes and their connecting waters were among such public navigable waters.

From that decision henceforth, the scope of admiralty jurisdiction over maritime torts was made to depend upon their having occurred either on the high seas or on navigable waters. The locus being made evident, the jurisdiction followed.

See:

Jackson v. The Magnolia, 20 How. 296;
Hough v. Western Transp. Co., 3 Wall. 20;
Rock Island Bridge, 6 Wall. 213;
Exparte Easton, 95 U. S. 68;
Panama R. Co. v. Napier Shipping Co., 166 U. S. 280;
Atlantic Transport Co. v. Imbrovek, 234 U. S. 52.

It would appear clear, therefore, that the jurisdiction of the Admiralty Courts of the United States in cases of maritime torts does not depend upon the territoriality of the waters whereon the maritime tort arose. As is conceded at page 20 of petitioners' brief, innumerable cases might be cited where the admiralty courts of the United States have taken jurisdiction of collisions which occurred on the high

seas or in foreign territorial waters. Clearly, the power to exercise such jurisdiction is not made effectual by reason of the territoriality of the water where the tort occurred, but rather because of the existence of a maritime tort arising upon navigable water, of which tort cognizance is given by the general maritime law, as accepted in the United States.

When such jurisdiction is invoked for the redress of a maritime tort thus arising, it is not necessarily mandatory that the admiralty courts of the United States thereupon exercise such jurisdiction. It is not to be doubted that, in the cases of suits instituted by citizens of the United States seeking redress for a maritime wrong, the admiralty courts of the United States are bound to exercise jurisdiction and afford redress for such wrong, assuming the presence before the Court of the res or the person responsible for the wrong. That is a natural inherent right to which such litigant is entitled by virtue of his citizenship. But when the jurisdiction of our Courts of Admiralty is invoked in suits of a maritime nature between foreigners, such right, incident to citizenship in the United States, no longer obtains and the privilege of so obtaining redress no longer necessarily follows. The jurisdiction of the Court of Admiralty to afford redress for the maritime wrong still remains undoubted, but the question then is one of comity whether such jurisdiction be exercised. In such case, diversity of nationality between the parties tends to invite assumption of jurisdiction; identity of nationality, the refusal.

Thus, in *The Maggie Hammond*, 9 Wall. 435, the underlying principle upon which the suit was based was the existence of a maritime lien given by the general maritime law and hence enforcible in a Court of Admiralty. The action was brought by a Canadian against a Canadian vessel for breach of contract of affreightment. It being established that cargo owner possessed a maritime lien against the

carrying vessel, it was there determined that the question of the enforcement of such a lien was not one of jurisdiction but of comity, as jurisdiction to enforce such maritime lien was clearly conferred upon our courts. In deciding the question of jurisdiction this Court said at page 457:

> "In this country, says Mr. Parsons, it seems to be settled, that our Admiralty Courts have full jurisdiction over suits between foreigners, if the subject matter of the controversy is of a maritime nature, but the question is one of discretion in every case, and the Court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum."

So also, in the case of *The Belgenland*, 114 U. S. 355 where collision occurred upon the high seas between vessels of different foreign nationality, this Court examined into the question of jurisdiction in maritime actions pending between foreigners in our Courts of Admiralty. It was there said at page 364:

> "Not alone, however, in cases of complaints made by foreign seamen, but in other cases also when the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow-subjects as to matters of contract or tort solely affecting themselves and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not."

The objection there made to the exercise of jurisdiction was, in fact, overruled but it is apparent from the opinion that the controlling reason for the decision was that the controversy was one between foreigners of different nations —arising out of the common law of nations—and hence the maintenance of jurisdiction by our courts was determined to be proper, there being no common home forum to which the litigants might be remitted.

The existence of discretion respecting the exercise of such jurisdiction being established, it is obvious that the principle must obtain, not only concerning suits for the redress of wrongs arising upon the high seas, but also concerning similar controversies arising upon any navigable water to which such admiralty jurisdiction extends. The principle must apply with like effect throughout the whole extent of the realm of admiralty jurisdiction. To concede its application in certain cases and to deny it in others is to employ a limitation not heretofore favored.

The expressions of this Court in the cases of *Charter Shipping Company v. Bowring, Jones & Tidy*, and of *Langnes v. Green*, adequately express the principle. They are based upon authority and express the doctrine that "the Court will not take cognizance of the cause if justice would be as well done by remitting the parties to their home forum."

The decisions cited as authority in support of this contention of petitioners do not deal in any degree with the subject of jurisdiction in admiralty and maritime controversies or with foreigners as parties litigant therein. Cases relating to the obligation of State courts to enforce remedies provided by Federal Statutes or involving the issue of impairment of Federal jurisdiction by State regulation respecting the modes of redress afforded citizens have no relation to the field of admiralty and maritime jurisdiction. Consequently, such citations cannot be regarded as having any authority upon the point as to which they are cited.

It follows that the exercise of the constitutional grant of authority by a Court of Admiralty of the United States is not necessarily mandatory.

SECOND POINT.

THE DOCTRINE OF LEX LOCI DELICTI HAS NO APPLICATION TO CASES OF COLLISION OCCURRING UPON THE GREAT LAKES.

The libels allege that the collision between the Steamers *Yorkton* and *Mantadoc* occurred "about 3 miles northwest of Whitefish Point, on Lake Superior, in American Waters." (R. pp. 3, 37, 41.)

Upon this allegation, petitioners assert that the rights and liabilities of the parties arise entirely under and by reason of the law of the United States, and that hence there is no discretion to decline jurisdiction, even though the suitors are all foreigners of the same nationality having a common forum.

It must be accepted that it was the general maritime law, as then known and understood, which, by virtue of the constitutional grant and subsequent Congressional enactment, became the law of the land for the regulation of rights and obligations growing out of foreign and domestic navigation and commerce.

The provision for jurisdiction of admiralty and maritime cases presupposed the existence in the United States of a law of that character—otherwise there would be no cases of admiralty and maritime jurisdiction.

See:

Panama Railroad Co. v. Johnson, 264 U. S. 375, 385.

The transactions and obligations growing out of water borne commerce are to be determined and adjudicated by

and under the general maritime law. They are not at all concerned with or dependent upon the *lex loci delicti*, or municipal law, in any case where the maritime law furnishes the measure of the obligation.

In *The Lottawanna*, 21 Wall. 558, it was said at page 575:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

See also:

Workman v. City of New York, 179 U. S. 552;
Southern Pacific Co. v. Jensen, 244 U. S. 205.

It is clear that there is created, by reason of the occurrence of collision and as security for the damages suffered, a maritime lien, a *jus in re*. That lien or privilege arises out of, and has its source in, the general maritime law. It may be enforced *in rem* wheresoever the offending ship may be found.

See:

The John G. Stevens, 170 U. S. 113, 115, 122, and cases cited.

That principle is equally applicable to all claims arising in tort which can be enforced in admiralty. *The John G. Stevens, supra.*

However, neither in jurisdiction nor in the method of procedure are our Admiralty Courts dependent alone upon the theory of implied hypothecation—the petitioner may proceed *in personam* if the respondent is within the reach of process.

See:

North Pacific S. S. Co. v. Hall Bros. Co., 249 U. S. 119, 126, and cases cited.

The form of the procedure is immaterial—at most it is but enforcement of the right which emanates out of the collision as the creature of the maritime law. In the case of *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, this Court, at page 384, drew the distinction between rights and remedies thus:

> "A right is a well founded or acknowledged claim, a remedy is the means employed to enforce a right or redress an injury."

A collision occurring on any public navigable water, whether on the high seas, the Great Lakes or in foreign waters is solely justicable because the general maritime law provides a lien, a right or privilege, arising therefrom, which right is not dependent upon the mere place of the collision or the municipal law effective thereat.

A. The Great Lakes and Their Connecting Channels Constitute Public Navigable Waters, Irrespective of the Location of the International Boundary.

The location and existence of the international land boundary separating the United States and Canada, and extending, by virtue of the treaty provision, through the Great Lakes and their connecting waterways has no controlling

effect over the rights and obligations of parties arising from navigation and commerce upon these waters.

During approximately the first half-century following the adoption of the Constitution but little was known nationally respecting the character and importance of the Great Lakes as avenues of navigation and commerce. The thirteen original states bordered upon tide water and the English doctrine of the limitation of admiralty jurisdiction to the ebb and flow of the tide was naturally accepted.

With the passage of time, the development of the nation westward, particularly along the interior waterways, carried with it a substantial development of navigation and commerce upon the Great Lakes. In 1851 this Court examined the question of admiralty jurisdiction, as related to those waters, in the case of *The Genesee Chief*, 12 How. 443. It was there determined that the ebb and flow of the tide no longer measured the extent of admiralty jurisdiction, but that such jurisdiction was made to depend upon the navigable character of the water—if it was navigable, it was public, and, if public, "within the legitimate scope of the admiralty jurisdiction conferred by the Constitution." It was there said at page 457:

> "The lakes and waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

In 1868, in the case of *The Eagle*, 8 Wall. 15, where a collision occurred between vessels of the United States upon the Canadian side of the Detroit River, this Court further considered the subject because of the questions of law there involved. It was there argued that the laws of

the United States had no extra-territorial force, and that since no lien for collision was then given under the laws of Canada, none could be created. After referring to the prior decision in *The Genesee Chief* and cases following, it was there said at page 20:

> "It follows, as a necessary consequence of this interpretation of the grant in that instrument, the District Courts, upon which the admiralty jurisdiction was exclusively conferred by the Judiciary Act of 1789, can take cognizance of all civil causes of admiralty jurisdiction upon the lakes, and waters connecting them, the same as upon the high seas, bays and rivers navigable from the sea. These waters fall within the same category, and are subject to the same jurisdiction, and hence the circumstance that a portion of them lie within the limits of another sovereignty constitutes no objection to the exercise of this power."

In *United States v. Rodgers*, 150 U. S. 249, this Court gave full consideration to the nature and character of the Great Lakes, with reference to the question of jurisdiction, arising under a Federal Statute, over a crime committed on board a vessel of the United States, while the vessel was within the territorial limits of Canada. It was there said at page 265:

> "We do not accept the doctrine that, because by the treaty between the United States and Great Britain the boundary line between the two countries is run through the center of the lakes, their character as seas is changed, or that the jurisdiction of the United States to regulate vessels belonging to their citizens navigating those waters and to punish offenses committed upon such vessels, is in any respect impaired. Whatever effect may be given to the boundary line between the two countries, the jurisdiction of the United States over the vessels of their citizens navigating those waters and the persons on board remains unaffected."

Again, in *Panama Railroad Co. v. Napier Shipping Co.*, 166 U. S. 280, it was held that a Court of Admiralty of the United States had jurisdiction over a cause of action which arose in the waters of a foreign power, express reference to the connecting waterways of the Great Lakes being made thus at page 285:

> "Indeed, large numbers of collisions arise upon the Canadian side of the St. Clair, Detroit and St. Lawrence rivers, which would not be cognizable in our courts, if the general proposition claimed by the appellant were true, since by the treaty between this country and Great Britain the boundary line is located in or near the center of the river."

That the question was clearly regarded as settled is apparent from the later decision of this Court in *The New York*, 175 U. S. 187. In that case, two steamers of American registry and ownership were in collision, concededly upon the Canadian side of the Detroit River, the *Conemaugh* almost immediately thereafter striking the Canadian bank and there sinking. Eminent admiralty counsel were engaged in the case throughout its devious course. It is significant that nowhere in the various reports of that litigation is there suggested the proposition here urged. It must be accepted that not only counsel, but this Court as well, then regarded the question of jurisdiction over a collision occurring within the territorial limits of Canada as entirely unaffected by the location of the International Boundary.

In the lower courts, the earliest case relating to the exercise of jurisdiction by our Courts of Admiralty concerning matters arising upon the Great Lakes appears to be that of *The Young America;* Newb. 101, Fed. Cases No. 12549. That was a libel for collision occurring in the Wel-

land Canal. Objection to the jurisdiction was overruled and it was held that the waters of the Welland Canal constituted navigable waters within the admiralty and maritime jurisdiction of the United States.

Extensive consideration was accorded the subject in the case of *The Avon*, Brown Adm. 170, Fed. Cases No. 680. There libel was filed *in rem* in the Northern District of Ohio against a Canadian schooner for the recovery of damages received by the propeller *Avon*, an American vessel, as a result of collision occurring between the vessels in the Welland Canal. Jurisdiction was maintained and decree entered against the Canadian vessel, although it was strongly urged by the claimant that since the law of Canada then gave no lien, none could be enforced in our Court, and that there was no jurisdiction here for wrongs occurring upon this artificial waterway wholly within the territorial limits of Canada. In a lengthy and carefully reasoned opinion, upon appeal, Circuit Judge Emmons held that the general maritime law was supreme, except where a sovereign power had expressly excluded the application of such law; that the lien arising from collision given by the general maritime law as universally recognized was enforcible wherever the ship might be found; and that the waters of the Welland Canal as used for international commerce, are within the admiralty jurisdiction of the United States. Jurisdiction was maintained and the decree below affirmed.

The case of *The Avon* was later referred to with approval by this Court in *Panama Railroad Co. v. Napier Shipping Co., supra*, in determining that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court. Again in the case of *Perry v. Haines (The Robert W. Parsons)*, 191 U. S. 17, this Court

again referred to the decision in the case of *The Avon* upon the proposition that the jurisdiction of the Admiralty Courts is settled as to the waters of any artificial canal which is the means of communication between ports and places in different states and territories, thus suggesting an additional reason as to the inapplicability of the contention of libelants.

Reliance has been placed by the libelants on the case of *Smith v. Condry*, 1 How. 28, as authority that the local law of the place of collision should govern. The collision there occurred between two American ships in the Port of Liverpool while the defendant's vessel was passing out of the port in charge of a Liverpool pilot, whose employment was compulsory under English statutory law. It was there contended that since the ship was exclusively in the pilot's charge, the owner and master were excused by the statute. This was held in the case, it being said at page 33:

> "The collision having taken place in the Port of Liverpool, the rights of the parties depend upon the British statutes then in force; and if doubts exist as to their true construction, we must of course adopt that which is sanctioned by their own courts."

This decision was urged in the case of *The Eagle, supra*, as authority for the assertion that the local law of the place of collision should govern. This Court, in considering the argument, there pointed out that all vessels entering or leaving a domestic or foreign port were bound to obey the laws and usages of that port and when so submitting, they are entitled to all the protection thereby afforded. It was said, (8 Wall. p. 22), in overruling the asserted effect of *Smith v. Condry*, together with a further case occurring similarly:

"These are exceptional cases, and furnished no rule to the Court below for the trial of the collision in question. It was tried there, as it should have been tried, according to the practice and principles of the Courts of Admiralty of this country, wholly irrespective of any local law."

The same contention was later made by the claimant in the case of *The Avon, supra.* It was there held that it was not enough *per se* that a collision happens where there is municipal power to exclude the maritime rule, but that it must further appear that it has actually done so; that the application of the doctrine of *lex loci delicti* does not necessarily apply to a marine tort as it would to a trespass within the real territory of the sovereign; and that it is not enough merely to ascertain the nature of the local code regulating wrongs generally in the nation, but that the equally important inquiry is—has the government declared that the municipal law shall be enforced upon foreign ships to the exclusion of the maritime rule? This, says the Court, is what is meant by the expression in *The Eagle* that *Smith v. Condry* was an exceptional case. *The Avon* holds that since Canada had failed to impose its municipal law over the Welland Canal, wholly contained within its territory, and which had been opened to the commerce of the world, the maritime law remained supreme. The decision rests upon its own reasoning, leaving *The Eagle* as determinative that the local laws are inapplicable in cases of collision occurring upon the waters of the Great Lakes.

The acceptance of the contention advanced by petitioners would necessarily involve the overruling by this Court of the decision in *The Eagle, supra,* as well as the principle enunciated in *United States v. Rodgers;* and also the ignoring of the cogent reasoning upon which is based

the decision in *The Avon, supra.* In addition, to accept petitioners' contention would require the determination that *The New York, supra,* was wrongly decided. If Canadian law should have been there applied because the collision occurred, and the loss was sustained, in Canadian waters; then this Court, having there found mutual fault, would *not* have awarded to the *Conemaugh's* cargo underwriters a full right of recovery of damage as against *The New York,* and the owners of *The New York* would *not* thereafter have been put to the necessity of bringing suit for contribution against the owners of the *Conemaugh.*

See:

Erie R. Co. v. Erie & W. Transp. Co., 204 U. S. 220.

Rather, if there required to apply the doctrine of *lex loci delicti,* would this Court have determined that the *Conemaugh's* cargo interests could recover *only* the measure of loss and damage given by the Canadian rule as against the noncarrying vessel, *i. e.,* a moiety of such loss and no more. The mere statement should be a sufficient refutation of the claim.

We, therefore, take it to be settled that the Admiralty Courts of the United States have jurisdiction over causes of collision occurring between American vessels while in foreign waters; and similarly that a collision between American vessels occurring in Canadian territorial waters upon the Canadian side of the international boundary extending through the Great Lakes will be adjudicated in the Admiralty Courts of the United States according to the maritime law as applied therein.

Is not the converse equally true?

Concededly, the Courts of Admiralty of Canada have jurisdiction of the case of a collision between Canadian vessels occurring in Canadian territorial waters, in which event the maritime law as understood in Canada would be applied. Such Canadian vessels and their owners are hardly to be deprived of their rights under Canadian law merely because collision between them occurs upon the American side of the international boundary line.

Practically speaking from the viewpoint of navigation, if the mere location of the international boundary line is to be the determining factor in determining liability and the measure of recovery for collisions occurring upon the Great Lakes, there will always first arise in every such case, the necessity of primarily determining the exact point of collision, in order to thus determine the law applicable thereto. Such would, indeed, be an absurdity for such a determination often could not be made with any practical certainty because of the difficult conditions of navigation which frequently obtain. A practical example of such difficulty is found in the present record where, because of fog, the masters of the colliding vessels were obviously indefinite as to the precise location of the collision, it appearing that upon the investigation by the Dominion Wreck Commissioner following the collision, they respectively located the place of collision at points six miles apart. (R. pp. 68, 69.) Again, suppose the collision occurred upon the exact boundary line, as would be altogether possible in the confined channels of the Detroit, St. Clair and St. Mary's Rivers, or even in the open waters of the lakes. In such case, would the Court apply the Canadian law or the law of this forum?

Certainly, the tremendous commerce of the Great Lakes has not been carried on and highly developed under

such a limitation. Rather, the vessels of either country alike have freely navigated the waters of the Great Lakes without consideration of the location of the boundary line; of necessity sometimes upon one side of the boundary and sometimes upon the other. In following the accepted courses and channels, numerous instances might be cited where vessels of each country are navigated without hindrance wholly within the territorial limits of the other nation. Not only this, but the navigation and pilot rules, as promulgated by each nation, have been harmonized in content and language because of such common usage and to thereby minimize the possibility of damage occurring upon such waters. Such harmonization was judicially noticed by this Court in the case of *The New York, supra.*

It results that the construction here contended for, would prove to be a grave deterrent to the maintenance and development of the tremendous commerce upon the Great Lakes, as well as destructive of the maritime harmony and international good will now existent upon these waters.

B. The Great Lakes Possess All the Characteristics of High Seas.

The waters of the Great Lakes constitute high seas in very fact.

Extending along the northern boundary of the nation a distance of twelve hundred or more miles, their waters make up the largest body of fresh water on the globe. Their aggregate area of nearly one hundred thousand square miles exceeds the area of many bodies of water which are geographically designated as seas and closely

approaches the area of the Mediterranean Sea. Modern freight and passenger vessels, of large size and tonnage, both domestic and foreign, navigate their waters throughout their entire extent; and, in so doing, are subjected to all the incidents of navigation common upon the oceans.

That the Great Lakes possess every essential characteristic of high seas has heretofore been determined by this Court.

See:

The Genesee Chief, supra;
United States v. Rodgers, supra;
Illinois Cent. R. Co. v. Illinois, 146 U. S. 387; 435;
Moore v. Am. Transp. Co., 24 How. 1, 38.

Emphasis to such determination is lent by the tremendous growth and increase of the commerce, both foreign and domestic, now borne upon these waters. Iron ore, coal, grain and stone are transported thereon in vast quantities. In addition, the movement of package freight and other commodities in such commerce is of enormous size. It is stated by an authority that the tonnage passing through the Sault Ste. Marie canals alone during the period between 1895 and 1912 increased approximately from fifteen million to seventy-two million tons. During the same period, with the development in size and carrying capacity of modern lake freight vessels, the average cargo increased from eighteen hundred tons to upwards of seventy-seven hundred tons, while the number of cargo vessels, both American and Canadian, was proportionately increased.

See:

Proceedings of International Joint Commission In Re Livingstone Channel, pp. 202-206. Government Printing Office, 1913.

Such growth in commerce upon these waters is readily understood when it is observed that a substantial portion of the needs of the population of both great nations bordering upon these waters is served through the agency of such commerce.

It is a matter of common knowledge also that the ships of many of the maritime nations of the globe navigate the waters of the Great Lakes as freely as do the ships of Canada and the United States.

As bearing upon this proposition, it is significant that Congress, in adopting the Shipping Act (Act Sept. 7, 1916; U. S. Code, Title 46, Chapter 23, Sec. 1) defined the term "common carrier by water in interstate commerce" as meaning a common carrier engaged in the transportation by water of passengers or property "on the high seas or the Great Lakes" on regular routes from port to port between different States, Territories, Districts or possessions of the United States, or between places in the same Territory, District or possession. Similarly in the identical Section, the term "common carrier by water" was defined as meaning a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on "the high seas or the Great Lakes" on regular routes from port to port. Reference to the Congressional Record (64th Congress, 1st Sess. Vol. 53, pts. 12 and 13, pp. 12363, 12793-12800) shows clearly that Congress made no distinction whatever between the high seas and the Great Lakes. The definition in the bill as originally passed in the House had omitted any limitation as to the waters to which the Act should apply, thus bringing within its purview all interstate carriers by water whether operating upon the high

seas, the Great Lakes or upon rivers. This was amended in the Senate, however, to read as now contained in the enactment. It appears from the reference to the Congressional Record that the intent of Congress, in so enacting the measure, was to eliminate from the bill reference to inland waterways, such as rivers, and to confine its regulatory features to commerce on the high seas and on the Great Lakes. It is clear, that for this important national purpose, it was thought proper to place the commerce upon the high seas and on the Great Lakes upon an identical basis with no differentiation between them. It is thus apparent that, in so enacting the Shipping Act, the legislative branch of the National Government regarded the waters of the high seas and the Great Lakes as essentially similar for the important purposes of commerce.

C. By Virtue of Treaty Provision, the Waters of the Great Lakes Constitute High Seas for All Essential Purposes of Navigation and Commerce.

Commencing with the Treaty of Paris of 1783, wherein a boundary line between Canada and the United States was originally fixed, and the Jay Treaty of 1794, wherein the right of common navigation was stipulated in favor of the citizens and subjects of both countries, the exercise of the rights of navigation and commerce upon the waters of the Great Lakes by the inhabitants and vessels of the two nations has been provided by international treaty stipulation.

The last and most significant treaty is the Root-Bryce Treaty of 1909 (36 Statutes at Large 2448). That treaty was the result of the labors for some years of the International Waterways Commission created in 1902 by concurrent legislation of the Governments of the United States and of the Dominion of Canada for the purpose of investi-

gating and reporting as to "the conditions and uses of the waters adjacent to the boundary between the United States and Canada, including all the waters of the lakes and rivers whose natural outlets is by the river St. Lawrence to the Atlantic Ocean." Reports and recommendations being made by such commission from time to time, negotiations were entered into between the two Governments, culminating in the Root-Bryce Treaty. Its importance to the inhabitants of the two nations is manifold.

Papers Relating to Work of International Joint Commission, Ottawa, 1929. (Article by William H. Smith, Secretary-American Commission, pp. 101, 103, 104.)

The Root-Bryce Treaty provides as follows:

"TREATY
Between
THE UNITED STATES AND GREAT BRITAIN
RELATING TO BOUNDARY WATERS, AND QUESTIONS ARISING BETWEEN THE UNITED STATES AND CANADA.

The United States of America, and his Majesty the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India, being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends, and for that purpose have appointed as their respective plenipotentiaries:

The President of the United States of America, Elihu Root, Secretary of State of the United States; and

His Britannic Majesty, the Right Honorable James Bryce, O. M., his Ambassador Extraordinary and Plenipotentiary at Washington;

Who, after having communicated to one another their full powers, found in good and due form, have agreed upon the following articles:

PRELIMINARY ARTICLE.

For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers and waterways, or waters flowing from such lakes, rivers and waterways, or the waters of rivers flowing across the boundary.

ARTICLE I.

The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use thereof, but all such rules and regulations and all tolls

charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof."

The subsequent provisions of the Treaty provide for limitation upon the further use or diversion of boundary waters upon either side of the boundary, and for the creation of an International Joint Commission to which there shall be referred for decision questions or matters involved in the provisions thereof. It is, we think, proper to suggest that the provisions of the Root-Bryce Treaty create new international law applicable to boundary waters, representing, as it does, the studied assent of the peoples of the two neighboring countries to a method of international conciliation for the prevention of disputes regarding the use of such boundary waters.

From the provisions of this treaty, it is apparent that, irrespective of the existence and location of the geographical boundary line between the two countries, the entire body of water of each of the boundary Great Lakes and their connecting channels constitute boundary water from main shore to main shore. Thereby emphasis is lent to the language expressed in the case of *The Avon, supra,* where in referring to the decision in *The Eagle, supra,* it was said (2 Fed. Cases, p. 260):

> "It occurred in boundary waters, the vessels were all American, exercising an international right in circumstances where, without exception, it has ever been held the local laws were inapplicable."

Under such definition and treaty provision, the common right of navigation and commerce upon such boundary waters, directly secured to the inhabitants and ships of both

countries equally, is provided to be only subject to such laws and regulations of either country within its own territory, as (a) are "not inconsistent with such privilege of free navigation," and (b) as apply "equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

It is provided that during the life of the Treaty, the same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters. This is but a restatement and extension of the similar provisions respecting the reciprocal rights of navigation on Lake Michigan and the Canadian canals and St. Lawrence River provided by the Treaty of 1854 and again stated in the Treaty of 1871. No national sovereignty is relinquished thereby as to waters such as Lake Michigan, the Welland and St. Lawrence Canals. Such waters are wholly contained within the territorial limits of the respective contracting nations. They constitute important adjuncts in the realm of commerce, because of which freedom of navigation is reserved thereon for such period of time as the treaty "shall remain in force." This provision is to be regarded as constituting an additional privilege to the right of navigation upon all *navigable boundary waters* which, it is provided, shall "forever continue."

In view of the plain import of the provisions of the Root-Bryce Treaty, the conclusions reached by the Acting Secretary of State in 1894 (quoted on page 13 of petitioners' brief) are not to be recognized as authoritative expression of the current status of these waters. The subject of fishing rights concerning which the opinion was rendered, has been since settled by treaty stipulations specifically disposing of matters in dispute relating to fisheries, and con-

stituting an International Fisheries Commission (Treaty of April 11, 1908). Similarly, the question of wrecking privileges was settled by the treaty stipulations entered into between Great Britain and the United States, in which reciprocal rights for such purposes in the Great Lakes and their connecting waterways were granted. (Treaty of May 18, 1908, Article II.)

Nor is the ownership of the lands under the water of the boundary Great Lakes affected by the treaty. No cession of such under water lands is provided in the treaty. It presumes to deal only with the reciprocal use of the waters of the boundary lakes and connecting waterways for navigation for the purposes of commerce; leaving the sovereign ownership of the lands beneath such waters in the respective states. Such right of ownership in the several states has always been, and still is, subject to the paramount right in the Federal Government to control the navigation of the waters covering such lands for the purposes of commerce, both interstate and foreign.

In view of the provisions of this Treaty any application of the doctrine of *lex loci delicti* in these causes would be unwarranted. The true intent of these treaty provisions is to free such privilege of navigation and commerce from the incubus of any local law or regulation not applying equally to the inhabitants and vessels of both countries, and to extend such privilege alike to the inhabitants and ships of both countries over the whole of such boundary waters. For purposes of navigation, as a result of the treaty, the territorial boundary line between the two countries ceases to exist in those waters therein defined as "boundary waters." The entire body of water of Lake Superior is alike Canadian and American so far as navigation is concerned. The treaty provisions clearly sustain such

international rights, thus granting to navigation and commerce upon these waters the same essential characteristics as upon the high seas where all are equal.

D. The Canadian law would be applied, if invoked.

If the reasoning contained in the foregoing portions of this brief is sound, it necessarily follows that if the District Court had retained jurisdiction, the controversy would have to be determined according to the rules of the Canadian law, assuming that the provisions of that law were invoked by respondent.

This conclusion is fully supported by the following decisions of this Court:

The Genesee Chief, 12 How. 443;
The Eagle, 8 Wall. 15;
United States v. Rodgers, 150 U. S. 249;
Panama Railroad Co. v. Napier Shipping Co., 166 U. S. 280;
The New York, 175 U. S. 187;
The Scotland, 105 U. S. 24;
The Belgenland, 114 U. S. 355;
The Eagle Point, cert. denied, 201 U. S., 644 (Reported at 142 Fed. 453).

The cases cited include disasters upon the oceans as well as upon the Great Lakes and their connecting waters. A collision between two American ships occurring upon the waters of the Great Lakes would clearly be adjudicated in our Courts according to the maritime law as accepted and applied in the United States. A collision between ships of two different nations occurring upon these waters would similarly be adjudicated in our courts according to the provisions of the maritime law as understood in the United

States, unless perhaps in the event that the same system of law was accepted by both such nations; in which case such law, if shown to the court, would be followed. But when a collision occurs between two Canadian vessels upon these waters, our forum, when called upon to settle the rights of the parties, would assume that they are subject to the provisions of the maritime law of Canada as evidenced by their common flag, and would apply such law, if the same be invoked by the respondent. This is so even though such law as accepted in Canada differs from the maritime law as understood in the United States, for such law of Canada is the maritime law which the parties mutually acknowledge. That is the law with respect to which the parties dealt and under which they established their rights in embarking upon this venture in the realm of commerce; similarly that is the law under which the ships were operated and for the violation of which the masters were held at fault following the disaster. The application of Canadian law to the facts and circumstances here present is complete.

In the case of *Cuba R. R. Co. v. Crosby*, 222 U. S. 473, it was said at page 480:

> "But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the place that established and would enforce their rights. A discretion is asserted in some cases even when the policy of our law is not opposed to the claim. *The Maggie Hammond*, 9 Wall. 435. The only just ground for complaint would be if their rights and liabilities when enforced by our courts, should be measured by a different rule from that under which the parties dealt."

The practical result of adoption of the petitioners' theory would be to overturn the settled law as illustrated by

the cited cases; to disturb the maritime harmony and international good-will existent between the two nations bounding upon the Great Lakes; as well as to create a situation wherein shippers and shipowners engaged in the already highly developed field of international commerce upon these waters would be wholly uncertain as to the ultimate measure of their rights and obligations when so embarking thereon. Moreover, the adoption of petitioners' theory would serve as an invitation to alien litigants to avail themselves of the American Admiralty Courts whenever some particular litigant thought that the American law would be more favorable to his case than the law of his home forum. Why should our already congested courts hear and determine controversies between non-taxpayers who have a common forum and law?

The petitioners here, by failing to urge any abuse of discretion in declining jurisdiction, tacitly concede that if the question of the retention or rejection of jurisdiction was discretionary, it was well exercised. It is, therefore, unnecessary to argue the question, as the finding of the Circuit Court of Appeals in that regard is not here questioned.

CONCLUSION.

THE DECREES OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED WITH COSTS.

Respectfully submitted,

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Buffalo, New York, February, 1932.

SUPREME COURT OF THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES.

Nos. 487, 488 and 489.—October Term, 1931.

Canada Malting Company, Ltd., Petitioner, 487 *vs.* Paterson Steamships, Ltd. British Empire Grain Company, Ltd., 488 *vs.* Paterson Steamships, Ltd. Henry K. Starnes 489 *vs.* Paterson Steamships, Ltd.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 11, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

These three libels in admiralty *in personam* were brought in the federal court for western New York, by owners of cargo laden on the steamer "Yorkton" to recover for loss resulting from the sinking of that vessel in a collision with respondent's steamer "Mantadoc", in Lake Superior, on the American side of the international boundary line. The respondent moved, in each case, that the District Court exercise its discretion to decline jurisdiction and dismiss the libels on the ground that all the parties were citizens of Canada and that the controversy concerned "matters . . . properly the subjects of hearing and determination" by the Canadian courts. The motions were granted, 49 F. (2d) 802, 804; and the decrees of the District Court were affirmed by the Circuit Court of Appeals for the Second Circuit, 51 F. (2d) 1007. This Court granted certiorari, 284 U. S. —.

Shortly after the collision, the Wreck Commissioner of Canada held a formal investigation, as required by law, respecting the circumstances of the collision, and determined that the masters of both vessels were at fault. The respondent then instituted in the admiralty court of Canada a proceeding for the judicial determination of the liability as between the colliding vessels and their owners. The libellants' motive for invoking the jurisdic-

tion of a court of the United States, instead of that of the Canadian court in which that proceeding was pending, appears in affidavits filed with the exceptions to the libel. Under the Canadian law, it is stated, if both colliding vessels were at fault each vessel would be liable for not more than half of the loss; and the salvaged value of the Yorkton might not suffice to pay its share. See *The Milan*, Lush. Adm. 401. Under our law the innocent cargo-owner can recover full damages from the non-carrying vessel. *The New York*, 175 U. S. 187, 209, 210.

The libellants concede, as they must, that in a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction; and that the exercise of its discretion will not be disturbed unless abused. *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515, 517. Compare *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U. S. 9; *Langnes* v. *Green*, 282 U. S. 531, 544. They claim, however, that the rule is not applicable here since the cause of action arose within the territorial limits of the United States; and, moreover, that if the District Court had discretion, the decrees should be reversed because, on the undisputed facts, it was an abuse of discretion to decline jurisdiction. We are of opinion that neither claim is well founded.

First. The contention that the jurisdiction was obligatory rests upon the fact that the collision occurred within the territorial waters of the United States. The argument is that a cause of action arising from a collision occurring on territorial waters of the United States arises out of its laws, since within its territory there can be no other law, *Smith* v. *Condry*, 1 How. 28, 33; *Slater* v. *Mexican National R. Co.*, 194 U. S. 120, 126; *New York Central R. Co.* v. *Chisholm*, 268 U. S. 29, 32; that the Constitution, Art. III, § 2, Cl. 1, extends the judicial power to "all cases of admiralty and maritime jurisdiction;" that § 24 of the Judicial Code confers upon the District Court jurisdiction "of all civil causes of admiralty and maritime jurisdiction;" and that by vesting jurisdiction in that court, Congress imposed a duty upon it to exercise the jurisdiction, *Cohens* v. *Virginia*, 6 Wheat. 264, 404; *McClellan* v. *Carland*, 217 U. S. 268, 281; *Second Employers' Liability Cases*, 223 U. S. 1, 58, 59. In support of the argument that there is no power to decline jurisdiction in cases where the cause of action arose within the United States, the libellants urge the statement in

The Belgenland, 114 U. S. 355, 365, that "the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong."

The respondent insists that the doctrine of *lex loci delicti* has no application to cases of collision on the Great Lakes; that the Great Lakes and their connecting channels constitute public navigable waters, irrespective of the location of the international boundary, and possess all the characteristics of the high seas, *The Eagle*, 8 Wall. 15, 22; *United States* v. *Rodgers*, 150 U. S. 249, 256; *Panama R. Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 285; *The New York*, 175 U. S. 187; *The Robert W. Parsons*, 191 U. S. 17, 27; that in a case of collision on the high seas between two vessels of the same nationality, liability is governed by the law of the flag, *The "Scotland"*, 105 U. S. 24, 29, 30; *The Eagle Point*, 142 Fed. 452, 454; that the Canadian law would apply in the cases at bar; and that hence, the asserted ground for the District Court's retaining jurisdiction fails.

We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy. The suggestion drawn from the language in *The Belgenland, supra*, that such discretion exists only "in cases arising beyond the territorial jurisdiction of the country to which the courts belong," is without support in either the earlier or the later decisions of this Court. Nor is it justified by the language relied on, when that language is read in its context. The case of *The Belgenland* arose out of a collision on the high seas between foreign vessels of different nationalities; and the objection was raised that the courts of the United States were wholly without jurisdiction. Mr. Justice Bradley, speaking for the Court, replied that jurisdiction in admiralty did exist over controversies between foreigners arising without the territorial waters of this country, but that the court in such a case would use its discretion in determining whether to exercise it. That the Court had no intention of denying the existence of similar discretion, where the cause of action arose within the territorial waters of this country, is shown by its reference to the cases of *The Maggie Hammond*, 9 Wall. 435, 457, and *Taylor* v. *Carryl*, 20

How. 583, 611, in which no such limitation was expressed, and which the Court described as "accurately stating" the law. The doctrine of these earlier cases was recently reiterated by this Court, in similar terms, in *Langnes* v. *Green*, 282 U. S. 531, 544, where it was said: "Admiralty courts . . . have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless, 'the question is one of discretion in every case, and the Court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.' " See also *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515, 517.[1]

The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts.[2] The question has most frequently been presented in suits by foreign seamen against masters or owners of foreign vessels, relating to claims for wages and like differences,[3] or to claims of personal

[1]Compare Mason v. The Ship Blaireau, 2 Cranch. 240, 264; Ex parte Newman, 14 Wall. 152, 168, 169; Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 285.

[2]See note 5, *infra*. See also One Hundred and Ninety-four Shawls, 1 Abb. Adm. 317, 321; The Sailor's Bride, 1 Brown's Adm., 68, 70; The Bee, 1 Ware 336, 339; Muir v. The Brig Brisk, 4 Ben. 252, 254; Thomassen v. Whitwell, 9 Ben. 113; Boult v. Ship Naval Reserve, 5 Fed. 209; The City of Carlisle, 39 Fed. 807, 815; Goldman v. Furness, Withy & Co., 101 Fed. 467, 469; The Kaiser Wilhelm der Grosse, 175 Fed. 215, 216, 217; The Iquitos, 286 Fed. 383, 384; Danielson v. Entre Rios Rys. Co., 22 F. (2d) 326, 327; The Canadian Commander, 43 F. (2d) 857, 858.

[3]Jurisdiction was declined in Willendson v. The Försöket, 1 Pet. Adm. 197; The Infanta, 1 Abb. Adm. 268, 268, 269; The Ada, 2 Ware 408; The Becherdass Ambaidass, 1 Lowell 569; The Montapedia, 14 Fed. 427; The Ucayali, 164 Fed. 897, 900; The Albani, 169 Fed. 220, 222.

In the following cases jurisdiction was taken, but the existence of discretion recognized: Thompson v. The Ship Catharina, 1 Pet. Adm. 104; Weiberg v. The Brig St. Oloff, 2 Pet. Adm. 428; Davis v. Leslie, 1 Abb. Adm. 123, 131; Bucker v. Klorkgetter, 1 Abb. Adm. 402, 405, 406; The Pawashick, 2 Lowell 142, 151; The Brig Napoleon, Olcott, 208, 215; The Bark Lilian M. Vigus, 10 Ben. 385; The Amalia, 3 Fed. 652, 653; The Salomoni, 29 Fed. 534, 537; The Topsy, 44 Fed. 631, 633, 635; The Sirius, 47 Fed. 825, 827; The Karoo, 49 Fed. 651; The Lady Furness, 84 Fed. 679, 680; The Alnwick, 132 Fed. 117, 120; The August Belmont, 153 Fed. 639; The Sonderberg, 47 F. (2d) 723, 725.

injury.[4] Although such cases are ordinarily decided according to the foreign law, they often concern causes of action arising within the territorial jurisdiction of the United States, compare *Patterson* v. *Bark Eudora*, 190 U. S. 169; *The Kestor*, 110 Fed. 432, 450. Neither in these, nor in other cases, has the bare circumstance of where the cause of action arose been treated as determinative of the power of the court to exercise discretion whether to take jurisdiction.[5]

Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.[6] The decisions relied upon by libellants are in-

[4]Jurisdiction was declined in The Carolina, 14 Fed. 424; Camille v. Couch, 40 Fed. 176; The Walter D. Wallet, 66 Fed. 1011, 1013; The Lamington, 87 Fed. 752, 757; The Knappingsberg, 26 F. (2d) 935, 937. See also Bolden v. Jensen, 70 Fed. 505, 509. Compare Bernhard v. Creene, 3 Sawy. 230, 234; The Noddleburn, 30 Fed. 142, 143; The Troop, 118 Fed. 70[illegible]2.

[5]The only case supporting the position of the petitioners which has been called to our attention is The Apurimac, 7 F. (2d) 741, 742, involving an action by a foreign seaman for injuries sustained on a foreign vessel lying in American waters. The expressions of the District Court in this case, however, were disapproved by the Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment on the ground that jurisdiction, although discretionary, had been properly taken. Heredia v. Davies, 12 F. (2d) 500, 501.

In The Steamship Russia, 3 Ben. 471, 476-479, the district court for the southern district of New York, took jurisdiction of a libel arising out of the collision of foreign vessels of different nationalities in New York harbor, but expressly treated the question as one within its discretion. In The Bifrost, 8 F. (2d) 361, 362, jurisdiction was declined in an action by foreign seamen for breach of contract in shipping articles, although it was urged that the articles were signed in this country and governed by its law. See also Fairgrieve v. Marine Ins. Co., 94 Fed. 686, 687; The Ester, 190 Fed. 216, 221; Cunard S. S. Co. v. Smith, 255 Fed. 846, 848, 849; The Eemdyjk, 286 Fed. 385; The Seirstad, 12 F. (2d) 133, 134; The Fredensbro, 18 F. (2d) 983, 984; The Sneland I, 19 F. (2d) 528, 529; The Falco, 20 F. (2d) 362, 364. Compare Neptune Steam Nav. Co. v. Sullivan Timber Co., 37 Fed. 159.

[6]Compare Davis v. Farmers' Co-operative Equity Co., 262 U. S. 312; Logan v. Bank of Scotland, (1906) 1 K. B. 141; Société du Gaz de Paris v. Arma-

apposite for several reasons. They were not in admiralty causes; nor did they involve alien or non-resident parties. Compare *Second Employers' Liability Cases*, 223 U. S. 1, 58, 59, with *Douglas* v. *New York, New Haven & Hartford R. Co.*, 279 U. S. 377. The cases of *Cohens* v. *Virginia*, 6 Wheat. 264, 404, and *McClellan* v. *Carland*, 217 U. S. 268, 281, denied the right to abdicate to state courts jurisdiction which the Constitution in positive terms entrusts to the federal judiciary.

Second. There is no basis for the contention that the District Court abused its discretion. All the parties were not only foreigners, but were citizens of Canada. Both the colliding vessels were registered under the laws of Canada; and each was owned by a Canadian corporation. The officers and the crew of each vessel —the material witnesses—were citizens and residents of that country; and so would not be available for compulsory attendance in the District Court. The cargo, in each case, was shipped under a Canadian bill of lading from one Canadian port to another. The collision occurred at a point where the inland waters narrowed to a neck and the District Court concluded that the colliding vessels proceeded in United States waters unintentionally. If the libellants are entitled to have applied the law of the United States in respect to the liability, the Canadian courts will, it must be assumed, give effect to it. The District Court embodied in the decrees an order that the respondent should appear and file security in any action which might be instituted by the petitioners in the admiralty courts of Canada, so that petitioners would not by dismissal of the libels lose the security gained by the foreign attachment. It is difficult to conceive of a state of facts more clearly justifying the refusal of a District Court to retain jurisdiction in a cause between foreigners.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of these cases.

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teurs Francais, (1926) Sess. Cas. (H. L.) 13. See, for collections of authorities, Paxton Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law", 29 Col. L. Rev. 1; Roger S. Foster, "Place of Trial in Civil Actions", 43 Harv. L. Rev. 1217, "Place of Trial—Interstate Application of Intrastate Methods of Adjustment", 44 *id.* 41; Note, 32 A. L. R. 6.